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Supreme Court, U.S.
FILED
07-155 AUG 06 2007
OFFICE OF THE CLERK

No. 07-_____

IN THE
Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Power Act directs the Federal Energy Regulatory Commission (FERC) to ensure that wholesale power rates charged by public utilities are "just and reasonable." Municipalities opted to sell electricity through clearinghouse auction markets operated by public utilities that are subject to FERC jurisdiction. FERC has concluded that the rates charged in these markets were unjust and unreasonable, and ordered all sellers to make refunds—including municipalities. Was FERC justified in ordering municipalities to pay the same refunds it ordered from all other sellers?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Pacific Gas and Electric Company. Petitioner intervened in the proceedings before the Court of Appeals, where FERC was the respondent.

The following Respondents were the petitioners before the Court of Appeals:

Bonneville Power Administration
Arizona Electric Power Cooperative
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
City of Los Angeles Department of Water and Power
Sacramento Municipal Utility District

The following Respondents were petitioner-intervenors before the Court of Appeals:

Cities of Burbank, Pasadena, Redding, Santa Clara, and Palo Alto, California
Imperial Irrigation District
M-S-R Public Power Agency
Northern California Power Agency
State Water Contractors/Metropolitan Water District of Southern California, Modesto Irrigation District
Transmission Agency of Northern California
Turlock Irrigation District

In addition to Petitioners, the following Respondents also intervened in the Court of Appeals:

California Independent System Operator Corporation
California Electricity Oversight Board
City of San Diego, California
City of Tacoma, Washington
Constellation Energy Commodities Group, Inc.

Coral Power, L.L.C.
Dynegy Power Marketing, Inc.
Duke Energy
El Paso Merchant Energy L.P.
PacifiCorp
People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General
Port of Seattle
Public Utilities Commission of the State of California
Reliant Energy Power Generation, Inc.
Salt River Project Agricultural Improvement and Power District
San Diego Gas & Electric Company
Southern California Edison Company
Williams Energy Marketing and Trading Co.

CORPORATE DISCLOSURE STATEMENT

Pacific Gas and Electric Company is a subsidiary of PG&E Corporation, a publicly traded company. No other entity owns more than 10% of Pacific Gas and Electric Company stock.

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INTRODUCTION

The job Congress gave FERC in the Federal Power Act (FPA) was to protect consumers by ensuring that the wholesale electric rates charged by public utilities are "just and reasonable." *E.g.*, FPA § 205(a), 16 U.S.C. § 824d(a); FPA § 206(a), 16 U.S.C. § 824e(a); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976).[1] Congress directed FERC to achieve that end both by reviewing wholesale rates in advance, *see* FPA § 205, 16 U.S.C. § 824d, and by ordering refunds if rates are unjust and unreasonable, *see* FPA § 206, 16 U.S.C. § 824e.

Over the past two decades, FERC has fundamentally restructured the electric industry, encouraging the creation of regional central clearinghouses for the sale of wholesale power. Within these regional clearinghouses, power is sold at market rates, but under rules that are approved by FERC. While the industry structure has changed, FERC's mandate to ensure that consumers do not pay unjust and unreasonable rates remains the fundamental and overriding statutory imperative of the FPA. The issue here is whether FERC can fulfill its mandate of ensuring that the nation's electricity is sold at just and reasonable rates if FERC cannot itself compel all those who overcharge consumers to pay refunds in the new FERC regulated markets.

This case arises out of the California energy crisis of 2000-2001, one of the most spectacular energy fiascos in our nation's history. FERC concluded that the rates charged in the California public utility clearinghouses during the crisis were unjust and unreasonable. Consumers were gouged by sellers to the tune of billions of dollars due to market

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[1] Petitioner cites the Excerpts of Record in the Court below as "ER" and the Appendix to this Petition as "Pet. App." Except where specifically noted, Petitioner's citations to the FPA are to the version in force during the California energy crisis, *i.e.* 2000-2001.

manipulation by Enron and other sellers. Accordingly, FERC ordered all sellers to pay refunds.

Municipalities sold fully 20% of the power that changed hands within the California clearinghouses during the relevant period, and some of those municipalities actively colluded in the market manipulations that caused prices to spike. But the Court of Appeals concluded that FERC could not enforce its refund order against municipalities. The result is a perverse situation in which FERC has found that rates were unjust and unreasonable, determined the price at which the sales should have been made, and is requiring refunds from private sellers, but FERC is powerless to compel refunds from the municipal sellers who made up a large chunk of the market. Worse yet, most of the municipalities both bought and sold power in these clearinghouses in the same time frame, and they are actually demanding refunds even as they refuse to relinquish their own excessive profits.

The Court of Appeals's conclusion conflicts with Supreme Court precedent, allowing—and, indeed, requiring—federal regulatory agencies to exercise their authority to ensure that rates within their jurisdiction are just and reasonable, even if the exercise of authority incidentally impacts areas that normally would fall outside the agency's jurisdiction. In overruling FERC, and preventing the agency from exercising its full authority, the Court of Appeals has yielded an untenable regulatory void, where FERC has found rates within its jurisdiction to be unjust and unreasonable, but has been rendered powerless to enforce a remedy.

If allowed to stand, this decision could have profound negative consequences for energy policy, and ultimately on the prices that consumers nationwide pay for power. Because of prodding from Congress and FERC, the modern electric power industry is organized around the very sort of public utility clearinghouse that is under the spotlight in this case. Thousands of municipalities play a role in power

markets generally, and sell power through these public utility clearinghouses. The Court of Appeals's ruling impairs FERC's ability to effectively regulate the sorts of markets that are now sweeping the nation. Ultimately, FERC cannot fulfill the congressional command to ensure that the rates paid within these markets are just and reasonable, if it cannot compel municipalities to comply with the same orders that bind all other sellers in the same FERC-regulat d markets.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 422 F.3d 908 (9th Cir. 2005), is reproduced at Pet. App. 1a-41a. The Court of Appeals's order denying rehearing, which is not reported, is reproduced at Pet. App. 42a-43a. Three FERC orders are on review in this appeal. They are reported at 96 FERC ¶ 61,120 (July 25, 2001); 97 FERC ¶ 61,275 (Dec. 19, 2001); and 99 FERC ¶ 61,160 (May 15, 2002). Relevant portions of these orders are reproduced at Pet. App. 44a-74a, 75a-148a, and 149a-54a, respectively.

The Court of Appeals entered its judgment on September 6, 2005, and denied rehearing on March 7, 2007. On May 21, 2007, Justice Kennedy extended the deadline for filing this petition to July 20, 2007. On July 24, Justice Kennedy further extended the deadline to August 4, 2007. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) and S. Ct. R. 13(3). This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

This case implicates the following statutory provisions: FPA § 201, 16 U.S.C. § 824; FPA § 205, 16 U.S.C. § 824d; FPA § 206, 16 U.S.C. § 824e, and FPA § 309, 16 U.S.C. § 825h. Petitioner provides these statutes at Pet. App. 155a-68a. Congress has since amended FPA Sections 201 and 206, and Petitioner provides the amended text at Pet. App. 169a-78a.

STATEMENT OF THE CASE

The Federal Power Act: Statutory Framework

Because this case unfolds against the backdrop of the Federal Power Act, we begin with an overview of the statutory framework. We describe the powers Congress bestowed on FERC and then the statutory limitation that the Court of Appeals invoked to limit FERC's remedy in this case. Then we explain how the interplay between these two provisions raises a vital question of statutory interpretation in modern-day energy markets.

FERC's statutory powers. The FPA declares that the business of selling electricity "is affected with a public interest," and that federal regulation of such sales "is necessary in the public interest." FPA § 201(a), 16 U.S.C. § 824(a). As this Court has long recognized, the FPA requires FERC to regulate public utilities for the benefit of consumers, principally to "protect power consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).

The FPA achieves that goal not by regulating retail prices charged directly to consumers, but by regulating the *wholesale* rates of public utilities that are in turn passed on to consumers. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). FERC's primary job is to ensure that these wholesale rates are "just and reasonable." FPA §§ 205(a), 206(a), 16 U.S.C. §§ 824d(a), 824e(a).

The FPA directs FERC to achieve that goal through two main regulatory vehicles, codified in two consecutive sections of the FPA—Sections 205 and 206. Section 205 directs FERC to review contracts, tariffs, and rate schedules for wholesale electric sales by public utilities before they go into effect. 16 U.S.C. § 824d. Section 206 gives FERC the authority to investigate and review any existing rates charged by a public utility, whether in response to a complaint or on

its own motion. 16 U.S.C. § 824e(a). When FERC finds a rate to be unjust or unreasonable, it must order a new rate that is just and reasonable. *Id.*

To protect consumers during sometimes lengthy FERC proceedings, the FPA provides for refunds under both Sections 205 and 206. That is, sellers are permitted to collect challenged amounts while a Section 205 or Section 206 proceeding is ongoing, subject to paying back the excess amounts received if the proceeding ultimately determines the rates were too high. Under Section 206, FERC is authorized to order public utilities to refund rates charged for up to 15 months while an investigation is pending. FPA § 206(b), 16 U.S.C. § 824e(b). If FERC finds that the rates were unjust or unreasonable, it may then order refunds "of any amounts paid" that were "in excess of those which would have been paid under the just and reasonable rate ... which the Commission orders to be thereafter observed and in force." *Id.*

Beyond these two specific sources of regulatory authority, the FPA also authorizes FERC "to perform any and all acts, and to ... make ... such orders ... as it may find necessary or appropriate to carry out the provisions of" the FPA. FPA § 309, 16 U.S.C. § 825h.

The jurisdictional limitation. FERC's power to review rates (under Section 205) and its power to investigate and order refunds of rates determined to be unjust and unreasonable (under Section 206) do not extend to every wholesale electricity transaction. As noted above, FERC is generally authorized to regulate only sales by "public utilities." FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). The definition of "public utility" does not include municipalities and other governmental entities. FPA § 201(e), 16 U.S.C. § 824(e) (defining "public utility" with reference to "any person"); FPA § 3(4), 16 U.S.C. § 796(4) ("person" is an "individual or a corporation"); FPA § 3(3), 16 U.S.C.

§ 796(3) (definition of "corporation" excludes "municipalities").

The FPA underscores the definitional point in Section 201(f), which declares that:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State ... unless such provision makes specific reference thereto.

16 U.S.C. § 824(f).

Thousands of municipal agencies that participate in the generation, transmission, or distribution of electric power fall within the Section 201(f) exemption. So, too, do federal and state agencies. Federally funded rural electric power cooperatives are treated likewise. (For simplicity, we will refer to all these sorts of non-jurisdictional entities as "municipalities," and will refer to Respondents as "Respondent Municipalities.")

This exemption obviously means that when a municipality makes a bilateral sale of electrical power to a buyer, FERC does not regulate the price. But this exemption has never meant that municipalities are impervious to the financial consequences of FERC orders. To the contrary, when FERC regulates public utilities, it almost invariably affects municipalities that participate in the electrical power markets. That is why municipalities appear before FERC every day in electric rate cases, and specifically in proceedings brought under Sections 205 and 206. *See, e.g.*, *FPC v. Conway Corp.*, 426 U.S. 271, 273-74 (1976) (allowing municipalities to challenge rates of public utility in Section 205 and 206 proceeding).

Explaining in part the fact that FERC does issue orders affecting municipalities every day is the limitation that Section 201(f) applies only to "this subchapter," meaning

Part II, of the FPA (titled "Regulation Of Electric Utility Companies Engaged In Interstate Commerce"). Section 309, giving FERC authority to perform such acts and make such orders as necessary to carry out the Act is in Part III of the FPA (titled "Licensees And Public Utilities; Procedural And Administrative Provisions") and is therefore not subject to the Section 201(f) exclusion.

The modern-day statutory puzzle. When Congress first drafted the FPA, in 1935, the interplay between FERC's mandate to regulate *all* public utility sales and the limitation in Section 201(f) on FERC's authority over municipalities was fairly straightforward. But in the past two decades, FERC has fundamentally restructured the electric industry. *See infra* at 25-30. A central player in the modern-day electric industry is a creature Congress never conceived of: the public utility clearinghouse, commonly called an independent system operator (ISO) or a regional transmission organization (RTO). These entities control all the transmission lines in a region of the country, and likewise operate regional markets that match the supply and demand of hundreds of buyers and sellers of electricity in one massive and undifferentiated pool. The rules of the markets are spelled out in tariffs that are reviewed and approved by FERC. Municipalities participate actively in these public utility clearinghouse markets.

Because these public utility clearinghouses did not exist when Congress drafted the FPA, Congress did not contemplate the question presented here: When municipalities sell power through one of these FERC-regulated markets, and FERC concludes the rate charged was unjust and unreasonable, can FERC direct the municipalities to make refunds like everyone else? In other words, which prevails in this modern context: FERC's powers under Sections 206 and 309 to ensure that all rates charged in a public utility clearinghouse are just and reasonable or the

Section 201(f) jurisdictional limitation on regulating power sales by municipalities?

California Restructures Its Energy Markets

California was the first state to restructure its energy markets around the sort of public utility clearinghouses that have come to dominate the electrical industry nationwide. In 1996, following the lead of Congress and FERC, California enacted Assembly Bill (AB) 1890. This legislation provided for the creation of two public utility clearinghouses, the California Power Exchange Corporation (CalPX) and the California Independent System Operator Corporation (CAISO).

The CalPX was responsible for operating auctions for the sale of electrical power. Every day, the CalPX would run an auction to meet buyers' anticipated daily power needs for the next day. The CalPX also conducted hourly auctions to meet ever-changing energy demands. The CAISO was responsible for managing the transmission grid, the intricate and finely balanced web of high-voltage wires that carry electricity across a vast region. But the CAISO also operated auction markets to meet energy needs instantaneously. *See Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 835 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

The CAISO and CalPX were established as nonprofit, public benefit corporations under California law. They did not make sales or trades on their own behalf. Rather, they operated only as centralized clearinghouses coordinating sales by others. Nevertheless, because they operated the markets in which electricity was sold at wholesale in interstate commerce, they were classified as public utilities. As such, they were subject to FERC's jurisdiction under the FPA. *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002); *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1147 (D.C. Cir. 2000). Accordingly,

both the CAISO and the CalPX operated under detailed tariffs that were approved by, and frequently amended by, FERC.

California's major public utilities, including Petitioner Pacific Gas and Electric Company, were legally required by AB 1890 to buy all of the power needed to serve their retail customers through the CAISO and CalPX. They had to satisfy the electricity needs of their retail customers, but they could not go elsewhere to do so. In contrast, other buyers, including municipalities, were not obligated to buy or sell through the CAISO and CalPX. They could do so voluntarily. Once a seller opted to sell power through one of these centralized clearinghouses, its sales were subject to FERC-approved tariffs and market rules governing the CalPX and the CAISO. *See generally Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758-59 (9th Cir. 2004), *cert. denied*, 545 U.S. 1149 (2005); *see also Lockyer v. Dynegy*, 375 F.3d at 835-36.

Under the tariffs, a central feature of these clearinghouses was the "single-price auction." As in most any other auction, sellers submitted offers for a particular time frame to supply power at a stated price, and purchasers submitted bids for the quantity of electric power they needed and the price they were willing to pay. But when the dust settled, every seller who sold electricity in any particular auction period—whether an hourly auction or the shorter ten-minute time frames relevant to real time sales—received *the same price* for its power. Mechanically, the CAISO and the CalPX achieved this result by matching offers to buy with offers to sell, beginning with the lowest-priced bids and continuing up to higher bids, until the amount of power offered matched the amount sought by purchasers at the prescribed price. The price of the last accepted bid—i.e., the highest price accepted—established the price for the entire market. So even if a seller had offered to sell power at a

lower price, the seller would collect the same price as every other seller in the same auction period. This single-price feature had the unintended effect of magnifying any market distortions that inflated the market price.

Buyers in these centralized markets obviously could not know at the time of the transaction which supplier sold them the electrons they purchased. They knew only that they were obtaining their power through the central market operator that coordinated sales and purchases. The customers purchasing in these markets relied on FERC oversight to ensure that all wholesale prices they paid were reasonable.

The California Electricity Crisis

Beginning in May 2000, energy prices in the CAISO and CalPX shot up to stratospheric levels, and stayed there for over a year. The prices were often ten times the historical price for electric power, and spiked at points to a hundred times the norm. The financial burden hobbled the major utilities and left California's transmission grid on the brink of collapse. Between May and October of 2000, the CAISO declared 32 system emergencies. In one week of June 2000, alone, California spent more on electricity than it had throughout the previous summer.

When the CAISO was unable to obtain the needed electricity, it ordered rolling blackouts—involuntary rotating outages of electric service for blocks of customers—over large areas of the state in a last-ditch attempt to prevent a grid collapse. For 30 consecutive days, the CAISO had to declare Stage Three Emergencies, an indication that the state's operating reserves had fallen to dangerous levels. The electricity crisis endangered California's economy and the health and safety of her citizens. Billions of dollars were borrowed to pay for the excess charges, and even today the rates paid by consumers include a component that is paying off this debt accrued during the crisis.

FERC Sets New Rates and Orders Refunds

In August 2000, a few months into the crisis, San Diego Gas and Electric Company filed a complaint at FERC alleging that the rates charged in the CAISO and CalPX markets were unjust and unreasonable.[2] FERC launched an investigation. Evidence compiled in several FERC proceedings and investigations demonstrates that many sellers manipulated the market to convey a false perception of scarcity that led to artificially inflated prices. While Enron was the most notorious manipulator, numerous other sellers participated in manipulation schemes, including several municipalities. To take just one example, the City of Glendale gave its employees a quiz to ensure that they knew how to help Enron execute an illegal scheme with the colorful name "Fat Boy"; Glendale then split the profits with Enron. *See, e.g.*, ER 725-27, 734, 736-39, 749-57.

Because all sellers in a CAISO or CalPX auction received the same price, they all shared in the illegitimate profits, whether or not they participated in the market manipulation. Municipalities were among the sellers who could not resist the lure of the astronomical prices. They provided more than 20% of the power sold into the auction markets, reaping enormous windfall profits from the excessive prices.

A year after the crisis began, FERC finally imposed price caps and prohibited sellers from withholding energy from the market. Invoking its power under Section 206 of the FPA, FERC also ordered all sellers to pay refunds for the unjust and unreasonable rates that had been charged before the crisis ended. Specifically, FERC set new just and reasonable rates for the CAISO and CalPX markets, based on

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[2] *See, e.g., Cal. Pub. Utils. Comm'n v. FERC*, 462 F.3d 1027, 1041 (9th Cir. 2006); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 at 61,349 (2000); *see also* ER 570 (the Complaint).

its assessment of what the rates would have been if the markets had been operating competitively. FERC ordered all sellers to refund the difference between what they charged and the recalculated, just and reasonable rate.

FERC Orders Municipalities, Like All Other Sellers, to Refund Their Overcharges

FERC included the municipalities in its refund order. They voluntarily entered these markets and voluntarily undertook to abide by the tariffs and by any price adjustment that FERC ordered.

In applying the refund methodology to municipalities and ordering them to pay refunds on the unjust and unreasonable rates that they had charged, FERC explained that its order:

> establishes a revised method for calculating the just and reasonable clearing prices to be applied in the [CAISO and CalPX] markets . . . . This is pursuant to the Commission's authority under FPA Section 206 to fix the just and reasonable rate. *Our action thus revises the . . . prices that all market participants previously agreed to accept for their sales.* In this context, we see no reason to treat [municipalities] differently, as they are receiving the same price, the just and reasonable market clearing price established pursuant to market rules approved by th[e] Commission, that they expected to obtain for their wholesale sales into the centralized ISO and PX spot markets.

Pet. App. 62a (emphasis added). Accordingly, FERC held that its jurisdiction attached not to the municipalities themselves, but to "the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-authorized and

Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including [the municipalities]." Pet. App. 63a.

Respondent Municipalities sought rehearing. Even the ones that were still actively pursuing refunds for power they bought insisted that they were immune from any FERC order directing refunds for power they sold. They argued that because Section 201(f) generally exempts their rates from FERC's jurisdiction, FERC was prohibited from applying its refund order to them. FERC rejected that argument:

> The involvement of the PX and ISO, whose roles are central in these California spot markets, along with the nature of the interstate wholesale sales, gives us subject matter jurisdiction entirely independent of the jurisdictional nature of the entities selling into the markets at issue. Thus FPA Section 201(f) does not change the analysis or the result in determining whether we have subject matter jurisdiction over the sales at issue.

Pet. App. 113a-14a (footnotes omitted).

The Court of Appeals Reverses

Respondent Municipalities appealed to the Ninth Circuit. The Court of Appeals held that FERC lacked authority to compel municipalities to refund their overcharges. Pet. App. 5a-7a. The court concluded that FPA Section 201(f) excludes municipalities from FERC's authority, under Section 206, to compel payment of refunds. Pet App. 14a-18a. The court believed that "the fact that [CAISO] and CalPX were public utilities is irrelevant because FERC is ordering refunds from [municipalities], not [the] ISO or CalPX themselves." Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for two reasons.

First, the Court of Appeals's opinion conflicts with a long line of Supreme Court precedent. The features of the Federal Power Act at issue here—imposing on the agency a statutory obligation to review and correct rates of certain transactions, coupled with a statutory prohibition against regulating other transactions—has been a feature of federal regulatory law for well over a century. This Court long ago addressed how to resolve cases where the overarching command clashes with the specific exclusion: the federal agency must fulfill its purpose and ensure just and reasonable rates. Even if the solution to the statutory puzzle was unclear in this case, the Court of Appeals was obliged to follow this Court's precedent and defer to the agency's determination that the best reading of the statute is to permit agency intervention.

Second, the question presented—concerning the scope of FERC's authority over participants within FERC-regulated centralized markets—is a question of great national importance. Public utility clearinghouses like the CAISO and CalPX did not exist when Congress drafted Section 201 of the FPA. But they are now prevalent in the electric power industry, and hundreds of municipalities actively participate in them. The answer to the question presented in this case will determine whether FERC can effectively enforce its orders so as to ensure that wholesale prices charged in such markets operated under public utility tariffs are just and reasonable.

I. THE COURT OF APPEALS'S DECISION CONFLICTS IRRECONCILABLY WITH THIS COURT'S PRECEDENT.

The Court of Appeals's opinion conflicts with two lines of Supreme Court authority. The first line of authority holds that a regulator may incidentally address matters that would ordinarily be outside its jurisdictional reach where necessary to fulfill its overarching obligation to ensure that rates within its jurisdiction are just and reasonable. *See infra* Point I.A. The second line requires deference to a regulatory agency's interpretations of the scope of its authority under its authorizing statutes, particularly in situations Congress never envisioned. *See infra* Point I.B.

A. The Court of Appeals's Opinion Conflicts with this Court's Precedents Holding that Agencies May Incidentally Exercise Authority Over Matters Outside their Jurisdiction to Ensure the Legality of Rates within their Jurisdiction.

The Court of Appeals's opinion recognizes that the CAISO and CalPX are public utilities, and recognizes that FERC has authority to establish and review rates for sales within the markets they operate. *See* Pet. App. 4a-5a, 23a-26a. FERC has exercised that authority, and found that rates charged within those markets were not just and reasonable. By barring FERC from enforcing its refund orders against all sellers in those markets, including municipalities, the Court of Appeals has created a regulatory void where FERC has found rates to be unjust and unreasonable, but cannot require a remedy. This regulatory void undermines Congress's purpose in enacting the FPA, and violates Supreme Court precedent holding that federal regulatory agencies may indeed enforce remedies in such circumstances.

There is nothing unique, or new, about the FPA jurisdictional provisions at issue in this case. The Federal

Power Act, enacted in 1920 and overhauled in 1935, is modeled on earlier federal regulatory statutes. Among them is the 1887 Act to Regulate Commerce (Commerce Act), which established the Interstate Commerce Commission (ICC). In keeping with the federal character of our government, the jurisdictional provisions of these regulatory statutes—and several statutes just like them—reflect a certain duality. On the one hand, in each statute Congress made an expansive grant of authority to regulate rates, whether over interstate transportation, or wholesale power sales in interstate commerce. On the other hand, these statutes reflect discrete jurisdictional carveouts, exclusions prohibiting the agencies from exercising their authority over local matters, whether they be intrastate transportation, retail or purely intra-state power sales, or (as in Section 201(f)) power sales by governmental entities. Other federal regulatory statutes, have similar provisions, most notably the Natural Gas Act of 1938 (NGA), which grants FERC broad authority over interstate gas transportation, but excludes authority over intrastate gas transportation.

Because the language and structure of the federal regulatory statutes are so similar, this Court has routinely considered the precedents interpreting them interchangeable. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981) (NGA and FPA are "in all material respects substantially identical" and the Court has adhered to an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes") (internal quotations and citations omitted).

In case after case over the past century, this Court has confronted situations where the agency could not fulfill its duty to ensure that rates within its jurisdiction were proper without incidentally considering, reviewing, or altering rates that fell within the statutory carveouts. When confronted with such a jurisdictional clash, this Court has consistently

held that the agency's obligation to ensure lawful rates for transactions within its jurisdiction trumps a blindered application of the jurisdictional carveout.

An early case addressing this jurisdictional tension was *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914). There, the ICC had held that certain railroad rates in interstate commerce had been set at a discriminatory level when compared to rates charged for intrastate rail transit. The discriminatory rates violated a provision of the Commerce Act. *Id.* at 355-56. The Commerce Act had a provision—a precursor of FPA Section 201(f)—prohibiting the agency from regulating intrastate transportation: "*Provided, however*, that the provisions of this act shall not apply to the transportation of passengers or property . . . wholly within one State . . . ." Commerce Act, Pub. L. No. 61-215, 36 Stat. 539, 545 (1910). Despite this express prohibition of intrastate regulation, the ICC ordered a remedy that ultimately altered the *intra*state rates. 234 U.S. at 356-57. This Court concluded that the agency acted within its authority. The Court explained:

> Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and *the inquiry is whether the Commission had power to correct it*. We are of the opinion that the limitation of the proviso . . . does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one State.' *These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The*

> *powers conferred by the act are not thereby limited where interstate commerce itself is involved.*

Id. at 358 (emphasis added). Simply put, the proviso limited the agency's authority to fix intrastate rates in isolation, but this proviso had to yield where necessary to fulfill the agency's mission to ensure the lawfulness of rates within its jurisdiction.

Beyond the arena of transportation—and specifically, in the context of energy regulation—this Court has reached the same conclusion. For example, in *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), this Court resolved a challenge to the FPC's authority that involved the same jurisdiction provision—FPA Section 201(f)—that is at issue here. There, this Court confronted the argument that sales *to* municipalities were exempted from FPC authority, in part because Section 201(f) says that "*[n]o provision* of this subchapter *shall apply*" to municipalities. *Id.* at 313, n.23. On a literal reading of the statute, the claim had some force. But the Court refused to limit the agency's jurisdiction. *Id.* at 315-16. The Court held that Congress had intended the FPC to have plenary authority over wholesale power sales by public utilities, and found that such transactions were within FPC jurisdiction even when a municipality was involved. *Id. Accord Pennsylvania Water & Power Co. v. FPC,* 343 U.S. 414, 419 (1952) (finding that FPC's exercise of authority that affected intrastate power sales was consistent with Congress's intention in the FPA that the agency exercise plenary authority over interstate wholesale power sales and would otherwise have led to an unmanageable limitation on agency jurisdiction),

Several cases under the Natural Gas Act addressed similar issues—and reached the same conclusion. For example, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court reversed the Fifth Circuit Court of

Appeals and upheld the FPC's authority to approve curtailment plans that could result in curtailments to "direct sales" customers, in spite of a proviso in the NGA that exempted such customers from NGA jurisdiction. Like here, the Commission's ruling came in an era in which the normal functioning of markets was in disarray, with a shortages of natural gas looming throughout the Nation. *Id.* at 626. The Court upheld the FPC orders, concluding that the "FPC and other agencies created to protect the public interest must be free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *Id.* at 641-42 (internal quotations and citations omitted). The Court relied in part on the "broad mandate" given the agency under Section 16 of the NGA, which like Section 309 of the FPA authorized the FPC (now FERC) to take such actions and issue such orders as necessary to carry out the act. The Court further explained its mode of analysis for such jurisdictional clashes:

> . . .Congress 'meant to create a comprehensive and effective regulatory scheme,' of dual state and federal authority. Although federal jurisdiction was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare. This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and 'when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it

> cannot, then we are impelled to decide that federal authority governs.'

Id. at 631 (citations omitted).

In *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 25-28 (1961) this Court likewise determined that FPC actions affecting direct sales to non-jurisdictional industrial customers were not prohibited, even though the NGA excluded FPC jurisdiction over such direct sales, and in *Colorado Interstate Gas Co. v. FPC,* 324 U.S. 581, 600-04 (1945), the Court has held that the FPC permissibly considered production and gathering facilities in determining a pipeline's rate base, even though the statute denied the FPC authority over production and gathering facilities. Similarly, in *FPC v Conway*, 426 U.S. 271, 276-82 (1976), this Court affirmed the D.C. Circuit Court of Appeals' conclusion that the FPC had the authority to consider non-jurisdictional transactions in its evaluation of jurisdictional rates in order to ensure that jurisdictional wholesale rates are just and reasonable.

In harmony with *Houston Railway*, the conclusion that flows from these cases is that FERC must be enabled to incidentally address, as necessary, subject matter outside its usual jurisdiction in order to implement its responsibilities over transactions within its jurisdiction.

The Courts of Appeals have confronted many similar cases, and have repeatedly followed the precedents requiring FERC to exercise its jurisdiction to regulate rates within its jurisdiction, even where there is an incidental impact on non-jurisdictional subject matter. *See, e.g., United Distribution Cos. v. FERC,* 88 F.3d 1105 (D.C. Cir. 1996) (holding that FERC could exert rate authority over non-jurisdictional entities to fulfill its statutory responsibilities regarding the subject matter of its jurisdiction, where their sales were being made through a centralized market administered by the

jurisdictional pipeline pursuant to the rules of its FERC-approved tariff); *Panhandle E. Pipe Line Co. v. FERC*, 95 F.3d 62, 73-74 (D.C. Cir. 1996) (affirming FERC order requiring non-jurisdictional intrastate pipelines to refund amounts FERC found had been erroneously paid to them); *Pub. Utils. Comm'n v. FERC*, 143 F.3d 610, 617-18 (D.C. Cir. 1998) (ordering refunds from non-jurisdictional intrastate natural gas pipelines where a FERC-jurisdictional charge to interstate shippers was wrongly received by such pipelines, holding that FERC is obligated to find a remedy for charges it has found unlawful, even if that means requiring refunds from non-jurisdictional entities); *Transcontinental Gas Pipe Line Corp. v FERC*, 485 F.3d 1172 (D.C. Cir. 2007) (relying on Section 16 of the NGA to conclude that FERC has authority to issue monetary remedies, in relation to a breach of a FERC jurisdictional agreement that encompassed certain non-FERC jurisdictional facilities); *Pac. Gas & Elec. Co.*, 306 F.3d at 1119 (holding that § 201(f) does not justify FERC's failure to review the municipality's costs under § 205 in order to ensure that the CAISO's rates are just and reasonable); *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1281 (D.C. Cir. 2007) (holding that FERC could enforce an order against the owners of a facilities jointly owned by a municipality and a public utility, finding that "[a]ny proper construction of § 201 must give effect to both FERC's jurisdiction over certain transactions occurring over public utilities and to § 201(f)'s exclusion of state facilities").

The chain has been largely unbroken. Until this case. This case, which has now been followed by the D.C. Circuit, started what could well be a trend toward contracting FERC jurisdiction. *See Transmission Agency of Northern California v. FERC*, Nos. 05-1402, 06-1246, 2007 WL 2067034 (D.C. Cir. July 20, 2007) (vacating portion of a

FERC refund order directed at municipalities that had overcharged customers through the CAISO).

This case and the D.C. Circuit's decision to embrace it cannot be squared with the authority discussed above. Both the Ninth and D.C. Circuits should have employed the analysis discussed in *Louisiana Power, supra,* thereby considering FERC's obligation to ensure that rates charged within jurisdictional markets (such as the CAISO and CalPX) are just and reasonable and FERC's broad statutory authority under Section 309 of the FPA to take actions necessary to enforce such a determination. They further should have considered that the municipalities were only incidentally impacted by FERC's actions. FERC had certainly not set about to regulate or require filings by municipalities—the impacts on municipalities were instead a byproduct of the fact that FERC had reset prices for all sellers in the CAISO and CalPX markets in the relevant time periods, and the municipalities happened to be among the sellers impacted by that decision.

As in *Louisiana Power* and the many other cases cited above, leaving the issue of compelling refunds to a myriad of state and federal courts around the country risks delayed and contradictory rulings that would thwart Congress's goal of just and uniform national regulation of wholesale power sales. If the Ninth and D.C. Circuits had followed this Court's precedent, they would have reached the opposite result, and would have found it wholly appropriate for FERC to order refunds from all sellers who overcharged the market during the relevant periods. In this context, municipalities are just another seller, no more or less.

B. The Court of Appeals's Opinion Conflicts with Supreme Court Precedent Requiring Deference to the Regulatory Agency when Interpreting the Scope of its Authority under its Governing Statutes.

As explained above, the structure of the electricity industry has substantially evolved in the past two decades. FERC has been on the forefront of those changes, as well as similar restructuring in the natural gas industry, and, as a result, is particularly well suited to evaluate and if necessary adjust its regulations and policy to ensure the continued protection of consumers. Not surprisingly, many of FERC's determinations have been appealed, thus requiring courts to confront fundamental questions about the scope of FERC jurisdiction in light of these new market structures. Repeatedly these cases have been resolved by deferring to FERC's expertise and sustaining FERC's jurisdictional determinations. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 498 U.S. 211 (1991) (reversing Fifth Circuit Court of Appeals and sustaining FERC's interpretation of NGA and Natural Gas Policy Act with regard to natural gas pricing); *United Distribution Cos.*, 88 F.3d 1105 (generally upholding FERC's restructuring of interstate natural gas pipeline industry); *New York v. FERC*, 535 U.S. 1, 28 (2002) (sustaining D.C. Circuit Court of Appeals's determination that FERC's jurisdictional decisions represented 'a statutorily permissible policy choice').

One particularly relevant example is *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000), in which the D.C. Circuit upheld a FERC determination that it had jurisdiction over the APX, a newly formed independent power exchange that could influence market prices. *Id.* at 1146-47. The D.C. Circuit deferred to FERC's interpretation of the FPA's jurisdictional provisions, holding that FERC had jurisdiction both over the entity and over the

transactions. *Id.* at 1154. En route to that conclusion, the D.C. Circuit reviewed the "significant transformation" that "the wholesale electric power industry" had undergone at "the end of the twentieth century," and specifically the emergence of "power exchanges" like the CAISO and CalPX. *Id.* at 1148. It observed that "[p]ower exchanges . . . did not exist when Congress enacted § 201 of the FPA," which makes it "unlikely" that the statute would provide a clear answer to the jurisdictional question. *Id.* at 1151. The D.C. Circuit then upheld FERC's conclusion that the APX fell within FERC's jurisdiction because it was the APX—not the individual buyers and sellers—that set the "final price at which the sale is actually transacted" and it is "precisely this feature that makes APX a public utility." *Id.* at 1150. The "central" role of the CalPX and CAISO, public utilities who operated the markets that set prices for all sellers, is exactly the rationale found by FERC, in this case, to give it jurisdiction to reset prices market-wide, and in turn to compel payment of refunds market-wide.

The deference the D.C. Circuit gave FERC in *APX* reflects this Court's view of the proper division of labors between agencies and courts. This Court has observed:

> Courts, we recognize, are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices. *See Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945) ("Rate-making is essentially a legislative function.") . . . . The Secretary of Transportation . . . is equipped, as courts are not, *to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.* If we had the benefit of the Secretary's reasoned decision . . . we would accord that decision substantial deference. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 366-67 (1994) (footnotes omitted; emphasis added). This observation has special force here, in light of the dramatically changed landscape in which FERC is regulating.

In contrast, the Court of Appeals here gave no serious consideration to these contextual changes and their impact on the relevant statutory language, finding instead that the statutory proviso, read literally, was not ambiguous and, therefore, deference to the agency was not required. Pet App. 26a. Of particular note was the Court of Appeals's failure to credit FERC's explanation of how refund orders work in these new-fangled centralized markets. As FERC explained, refunds are not actually assessed against municipalities, qua municipalities. Pet. App. 23a-26a. Rather, FERC resets the rate for the entire market, which means that all markets participants abide by the new rate, regardless of their jurisdictional status. Pet. App. 24a-25a. Thus, under FERC's reading of the statute, refunds are a by-product of an indisputably valid FERC determination, not a prohibited transgression of Section 201(f). This is certainly a plausible interpretation of the FPA, as this Court and the D.C. Circuit have found in similar circumstances involving both the FPA and analogous statutes. *See* Section I.A, supra. The Court of Appeals reached a different result because it failed to defer to FERC's special expertise in administering the FPA within "the field nationwide, and to regulate based on a full view of the relevant facts and circumstances," *Northwest Airlines*, 510 U.S. at 367, which have changed drastically since Congress drafted the relevant provision more than 70 years ago.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

This case is important, not just because it involves the single biggest energy market crisis in the nation's history and

not because of the sheer magnitude of money at stake. It is important because the legal issue concerning FERC's authority to ensure just and reasonable rates (by both setting rates and enforcing those determinations) will have ramifications well into the future for this country's energy policy and for the goals that Congress sought to achieve with the FPA.

The structural overhaul that the California Legislature undertook in 1996 is illustrative of the seismic change that has swept the industry nationwide. Through a fundamental restructuring of the energy markets, Congress and FERC together have ushered in what the D.C. Circuit has referred to as "a brave new regulatory world." *E. Ky. Power Coop., Inc. v. FERC*, No. 06-1003, 2007 WL 1713348 at *1 (D.C. Cir. June 15, 2007). In the past, most electricity had been sold by large local monopolies. These utilities were integrated; they had their own power plants, transmission lines, and local delivery systems. Customers could buy power only from these local monopolies, which charged a single bundled rate for power, transmission, and distribution. Their rates were set by state agencies. *See New York v. FERC*, 535 U.S. at 4.

Congress and FERC have fostered a very different model through a series of interventions designed to enhance competition—most notably, the Energy Policy Act of 1992, *see* FPA §§ 210-212, 16 U.S.C. §§ 824i, 824j, 824k, and FERC's Order No. 888.[3] The idea was that energy rates

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[3] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, Order No. 888, 61 Fed. Reg. 21,540, 21,614 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,761-62 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

should be established by the market, rather than by regulators. *See generally New York v. FERC*, 535 U.S. at 10 (describing the changes). In order to foster the desired competition, they had to take steps to ensure that all sellers could ship their electrons over the high-voltage transmission lines owned by integrated public utilities. That would ensure that more sellers, from farther away, could compete to make energy sales.

More importantly, for present purposes, FERC also believed that large, regional transmission systems—like the CAISO transmission grid—would enhance competition. Toward that end, in Order No. 888, FERC encouraged public utilities to turn control of their transmission lines over to independent entities—independent system operators (ISOs) and regional transmission operators (RTOs)—that would provide non-discriminatory access to all sellers over a large region.[4] Under this model, the ISO/RTO has the responsibility to ensure reliability and adequacy of both transmission and power supply. The ISO/RTO attempts to achieve efficiencies and reduce costs by obtaining power from many suppliers. Municipalities are free to sell power through these central clearinghouse markets, or not; but when they do, it is only pursuant to the rules and price setting mechanisms of the market-operator public utility, approved by FERC.

FERC took additional steps to ensure that RTOs and ISOs would proliferate across the country. *See, e.g., E. Ky. Power*, 2007 WL 1713348 at *1-*2. The ISO/RTO model

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[4] Order No. 888, 61 Fed. Reg. at 21,595, FERC Stats. & Regs. ¶ 31,036 at 31,730; *see also Regional Transmission Orgs.*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

now covers the most densely populated areas of the country. In addition to California, these clearinghouses have taken hold in New England (ISO New England), New York (New York ISO), the mid-Atlantic (PJM RTO), and the Midwest (Midwest ISO). Fully "two thirds of the electricity consumed in the United States [by] two-thirds of its population" is transmitted through an ISO. James Torgerson, Letter Accompanying Report by the ISO/RTO Council, *The Value of Independent Regional Grid Operators* (Nov. 14, 2005), http://www.isorto.org (under "Documents" tab). The RTO for the mid-Atlantic region alone—which encompasses Chicago, Philadelphia, and Washington, D.C.—accounts for nearly a fifth of the electricity consumption in the United States. *See* Elec. Energy Mkt. Competition Task Force, *Report to Congress on Competition in Wholesale & Retail Markets for Electric Energy* 31, FERC Docket No. AD05-17-000 (Apr. 5, 2007) [*Report on Competition*], http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act/epact-final-rpt.pdf.

The country's ISOs and RTOs generally use the same type of single-price auction as the CAISO and the CalPX. Like the CAISO and CalPX, other ISOs and RTOs generally aggregate the electrons sold by municipalities with electrons sold by public utilities, and send buyers a single bill. Buyers, then, have no idea whether the power they purchased in a particular timeframe was sold entirely, partially, or not at all by municipalities. Because they do not even know who sold their power, customers in these markets are dependent on FERC's oversight of the markets to ensure that prices are reasonable. Because these clearinghouses are themselves public utilities, the terms of their tariffs are subject to FERC's advance approval. Customers rely on FERC's review of the rules in those tariffs, and customers rely on FERC to enforce the pricing in its tariffs using its statutory refund authority.

If there is a hole in FERC's refund authority, it is a big problem. Nearly 3,000 municipalities play a major role in today's restructured electricity markets. *Report on Competition, supra*, at 14 (Table 1-1). In 2004, municipalities generated more than 20% of the total electricity generated in the United States. *Id.* at 16 (Table 1-4) (totals of publicly owned utilities, cooperatives, and federal power agencies). Municipalities have a profound effect even in states where relatively few of them are located. This is so because the regional markets embrace multiple states, which means that municipalities in one state can influence the electric market in other states.

On an issue as fundamental as whether or not FERC can comprehensively regulate ISO/RTO markets to enforce just and reasonable rates, the need for national uniformity is paramount. The Court of Appeals noted that buyers could pursue contract actions against the municipalities. Pet. App. 38a-39a. This solution to the problem will only stimulate expensive litigation in federal and state courts, and lead to delayed and potentially inconsistent results, rather than ensuring protection from excessive, unjust, and unreasonable rates as required by the FPA. There is only one way to ensure uniformity—allowing FERC itself to enforce its orders, a power that Congress already contemplated in Section 309 of the FPA, where Congress gave FERC all necessary authority to enforce its orders.

Finally, and contrary to what Respondents are likely to claim, the Energy Policy Act of 2005 (EPAct) did not resolve the uncertainty engendered by the Ninth Circuit's ruling. The EPAct amended FPA Section 206 to add new section 206(e)(2)-206(e)(4) allowing FERC to order refunds from certain very large municipalities in certain limited circumstances: short-term sales through centralized markets by those few municipalities that sell 8,000,000 megawatt hours or more of electricity per year, where the sale violates

the terms of the applicable tariff. FPA § 206(e)(2) & (3), 16 U.S.C. § 824e(e)(2) & (3). In 2005, only 24 of the nation's more than 2,000 municipalities sold enough power to meet this threshold. Am. Pub. Power Ass'n, *2007-08 Annual Directory & Statistical Report* 39 (100 Largest Public Power Utilities by Megawatt-Hour Sales, 2005), http://www.appanet.org/files/PDFs/100largestbymwhs.pdf. EPAct says nothing at all about how to treat the sales by the other 98.8% of municipalities, although those municipalities can and do sell into ISO and RTO markets. Moreover, the amendment is directed toward violations of the tariff or Commission rules, rather than the refund circumstances described in Section 206(b) of the FPA. So even for the 24 municipalities that meet the size criterion, the amendment leaves unanswered the extent of refund liability under Section 206(b) of the FPA, the issue presented in this case.

In short, even after Congress's adoption of EPAct, this case presents a critically important issue of national importance that only this Court can resolve.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 6, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 6, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 02-70262, 02-70274,
03-70185, 02-70270, 02-70294

BONNEVILLE POWER ADMINISTRATION,

Petitioner,

City of Tacoma; Port of Seattle; Coral Power, L.L.C.;
Constellation Energy Commodities Group, Inc.,

Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

PacifiCorp,

Respondent-Intervenor.

Appendix A

Arizona Electric Power Cooperative, Inc.; Dynegy Power Marketing, Inc.; Duke Energy North America, LLC, Duke Energy Trading and Marketing, LLC, (Collectively, "Duke Energy"); El Paso Merchant Energy L.P.; Metropolitan Water District of Southern California; Williams Energy Marketing & Trading Company; Reliant Energy Power Generation, Inc.,

Petitioners,

Coral Power, L.L.C.,

Intervenor,

v.

Federal Energy Regulatory Commission,

Respondent.

Southern California Edison Company; City of Los Angeles Department of Water and Power,

Petitioners,

Port of Seattle; City of Tacoma; People of the State of California; City of Pasadena; City of San Diego; CA State Assembly,

Petitioners-Intervenors,

Appendix A

v.

Federal Energy Regulatory Commission, Respondent.
Sacramento Municipal Utility District,

Petitioner,

Port of Seattle; City of Tacoma; People of the State of California; City of Pasadena; City of San Diego; CA State Assembly,

Petitioners-Intervenors,

City of Pasadena, California,

Intervenor,

v.

Federal Energy Regulatory Commission,

Respondent.

Azusa, Banning, Colton, and Riverside, California,

Petitioner,

Coral Power, L.L.C.; Constellation Energy Commodities Group, Inc.,

Intervenors,

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v.

Federal Energy Regulatory commission,

Respondent,

PacifiCorp,

Respondent-Intervenor.

Argued and Submitted April 12, 2005.

Filed Sept. 6, 2005.

On Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before: THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

McKEOWN, Circuit Judge:

The California energy crisis of 2000 and 2001 is a subject that is well-known to this court and to the public.[1] Following moves in the mid-1990s to deregulate and restructure the California market, prices soared. In an effort to remedy in part what it termed a "dysfunctional" and "seriously flawed" market, the Federal Energy Regulatory Commission ("FERC"

1. *See California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir.2004); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir.2004); *In re California Power Exch. Corp.*, 245 F.3d 1110, 1114-16 (9th Cir.2001).

or "Commission") ordered both public and non-public utilities to make refunds.

In this appeal, various non-public utilities-which somewhat confusingly are public, governmental entities, but are not classified by federal statute as public utilities-challenge the refund orders. The utilities take the position that FERC's refund authority extends only to "public utilities" and that the public entities, as governmental bodies, are not "public utilities" and are expressly exempted from FERC's refund jurisdiction. FERC, which is the federal agency charged with regulation of all facilities for transmission and sale of electric energy for resale in interstate commerce, acknowledges that while it does "not have direct regulatory rate authority over power sales by non-public utilities," it has the "authority to order them to abide by the market rules . . . and to make refunds of unjust and unreasonable rates. . . ." 96 FERC ¶ 61,120, at 61,511, 2001 WL 1704964 (2001). This case boils down to whether FERC's authority to order refunds is based on the identities of the sellers subject to the refund order, i.e., public versus non-public utilities, or on the nature of the transactions, i.e., FERC's broad regulatory authority over the sale of electric energy for resale in interstate commerce.

We conclude that FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities. Our resolution of this question flows from a straightforward analysis of the statute, the Federal Power Act ("FPA"). The text is clear and unambiguous. In coming to this conclusion, we are not unmindful of the impact our decision may have on the overall

refunds claimed by California ratepayers. But it is not our task to second guess Congress's judgment as to the breadth of FERC's refund authority. Our role is a limited one-interpreting the statute as Congress wrote it.

The FPA provides FERC certain authority in connection with public utilities as contrasted with non-public utilities and also provides an exemption for governmental entities. Although there is considerable overlap between non-public utilities and governmental entities, the categories are not co-extensive. *See* discussion below in §§ I(A) and (B). The FPA's requirement that all rates for wholesale sales of electric energy must be "just and reasonable"—the basis of the refund orders—applies only to "public utilities" and makes no reference, specific or otherwise, to non-public utilities. FPA § 205 (16 U.S.C. § 824d).[2] Similarly, FERC's authority to investigate rates and to order refunds is limited to any rate collected by "any public utility"; the statute carries no reference to nonpublic utilities. FPA § 206 (16 U.S.C. § 824e). The FPA also unambiguously states that the provisions of subchapter II, which is the basis of FERC's refund authority, do not apply to governmental entities "unless such provision makes specific reference thereto." FPA § 201(f) (16 U.S.C. § 824(f)). No reference is found in the statute. Consequently, we grant the petition and set aside FERC's orders related to the 2000 and 2001 spot market to the extent the orders subject the governmental entities and

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2. By convention, the parties and courts tend to refer to the FPA sections instead of the United States Code sections. This opinion will include dual references when each FPA section is referenced for the first time. Each subsequent reference will be to the FPA section only.

non-public utilities to FERC's refund authority under FPA subchapter II.

FACTUAL AND PROCEDURAL BACKGROUND

The history and legacy of the California energy crisis are long, detailed, and tortured. For purposes of resolving the jurisdictional question before us, however, a lengthy recitation of the background is unnecessary.

In the mid-1990s, California initiated an aggressive market experiment to deregulate and restructure its electric energy markets. The deregulation plan, sometimes referred to as the restructured energy market, called for the creation of two non-profit public benefit corporations, California Independent System Operator ("ISO") and California Power Exchange ("CalPX"). Until it ceased operations, CalPX was the overseer of an auction market for electricity across the California grid and operated subject to FERC tariffs and rate schedules. ISO was responsible for managing the flow of electricity across the grid.

One of the features of the restructured market was the creation of spot markets operated by CalPX and ISO for the wholesale sale of electric energy. The markets, tariffs, and rate schedules of both entities were approved by FERC because the markets involved the "sale of electric energy at wholesale in interstate commerce." FPA § 201(b)(1) (16 U.S.C. § 824(b)(1)).

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The spot markets were organized on the basis of a single-price auction in which sellers of electric energy would bid into the market. Those sellers included both public and non-public utilities. In a single-price auction, all of the bidders are paid the same price as was bid by the highest-priced seller whose electric energy was needed to "clear the market" or balance the supply of electric energy against the demand for electric energy. As a result, all of the bidders in a particular hour in the spot market received the same price for their sales.

FERC offered this explanation of how the single-price auction mechanism contributed to high wholesale electricity prices during the California electricity crisis and provided an opportunity for sellers to game the California spot markets:

> In times of adequate supply the single price auction disciplines prices by encouraging suppliers to bid their marginal costs so that they can be selected for dispatch and be paid the clearing price. However, in times of scarcity the single price auction can exacerbate the effect of supply shortages by allowing sellers who have small market shares to set the clearing price. Not only is the seller transformed into a price setter rather than a price taker, but the resulting price is ascribed to the entire market.

93 FERC ¶ 61,121, at 61,365, 2000 WL 1637060 (2000).

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The petitioners[3] in this case are public entities (cities, counties, irrigation districts, states, and a federal agency) (collectively, "Public Entities") that participated in the ISO/CalPX spot markets as sellers of electric energy. Each entity received the single price for its electric energy sales regardless of whether it was the last and highest bid that cleared the market. According to FERC, these public entities accounted for nearly 30% of the electric energy and ancillary services sales in the ISO and CalPX spot markets during the 2000-2001 period.

On August 23, 2000, FERC initiated an investigation in response to a complaint filed by San Diego Gas & Electric ("SDG & E") which claimed that the ISO/CalPX electric energy markets were producing unjust and unreasonable prices. SDG & E labeled the wholesale markets "dysfunctional" and noted that beginning in June 2000, wholesale electric prices at times exceeded, often by a

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3. The petitioners are the Bonneville Power Administration ("BPA"); Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California ("Southern Cities"); Sacramento Municipal Utility District ("SMUD"); City of Los Angeles Department of Water and Power ("LADWP"); and Arizona Electric Power Cooperative, Inc. ("AEPCO"); the petitioner-intervenors are the Cities of Burbank, Palo Alto, Pasadena, Redding, and Santa Clara, California; Imperial, Modesto and Turlock Irrigation Districts; State Water Contractors/The Metropolitan Water District of Southern California ("SWC/MWD"); M-S-R Public Power Agency; Northern California Power Agency; and Transmission Agency of Northern California. Except for three entities, the Public Entities engage in wholesale and retail generation, transmission, distribution, purchase and/or sale of electric power and energy in California. BPA, SWC/MWD, and AEPCO do not participate in the retail market.

multiple of three or four, price levels at comparable load levels in prior years. In August, FERC ordered a hearing "concerning the justness and reasonableness of the rates, charges, and practices of public utility sellers of wholesale power into the California" markets. 92 FERC ¶ 61,172, at 61,603, 2000 WL 1204898 (2000). The order contained no reference to governmental entities/non-public utilities. *Id.*

Following the August 2000 Order, FERC initiated an investigation. In a November 1, 2000 Order, FERC found that the California market structure and rates were seriously "flawed" and proposed fundamental modifications to the wholesale market. 93 FERC ¶ 61,121, at 61,370, 2000 WL 1637060 (2000). The Order included proposed price mitigation measures and refund liability of public utility sellers. *Id.*

Just six weeks later, in a December 15, 2000 Order, FERC terminated the CalPX wholesale rate schedule, outlined a complex web of mitigation measures, and conceded "[t]here [a]re [n]o [e]asy [a]nswers." 93 FERC ¶ 61,294, at 61,997 (2000). Specifically, the Commission proposed to limit the single-price auction by refunding prices in excess of a "breakpoint" price. *Id.* at 61,983, 2000 WL 1840337.

To implement the "breakpoint" price, on March 9, 2001, FERC established for public utilities a "just and reasonable 'rate screen' above which refunds will either be required or further investigation will be undertaken." 94 FERC ¶ 61,245, at 61,862, 2001 WL 406581 (2001). The Commission order was directed to "public utility sellers" and, referencing "non-

public utility sellers," the Commission stated that it "has no authority to order such sellers to make refunds." *Id.* at 61,864, 2001 WL 406581. A follow-up order on June 19, 2001, expanded the mitigation plan and directed "public utility sellers and buyers" to participate in settlement discussions. 95 FERC ¶ 61,418, at 62,570, 2001 WL 1910052 (2001).

The first order critical to this appeal came on July 25, 2001, when FERC made "clear that transactions subject to refund are limited to spot transactions in the organized markets operated by the ISO and CalPX during the period October 2, 2000, through June 20, 2001, and include sales by public and *nonpublic utilities* into these markets." 96 FERC ¶ 61,120, at 61,499, 2001 WL 1704964 (2001) (emphasis added).

In discussing jurisdiction over non-public utilities, FERC noted that "non-public utility sellers ... are not subject to our direct jurisdiction under FPA section 206." *Id.* at 61,511-12, 2001 WL 1704964. But FERC went on to conclude:

> Under the specific circumstances presented, . . . such jurisdiction may properly be asserted over nonpublic utility sellers of energy. Under the single price auction mechanism that operated in the centralized ISO and [CalPX] spot markets, all sellers agreed to accept the same clearing price for any given sale. . . . [A]ll sellers into those markets were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change if they were found to be unjust and unreasonable.

Id. at 61,512, 2001 WL 1704964.

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FERC admitted that its decision to order refunds from the Public Entities could be perceived as a change in FERC policy:

> While the Commission in other orders and in other contexts has stated that it does not have jurisdiction over non-public utilities under sections 205 and 206 of the FPA, we have re-examined our authority in the particular circumstances presented here: a centralized single clearing price auction that sets wholesale prices for both public utilities and non-public utilities, pursuant to market rules set by this Commission and administered by public utilities subject to this Commission's jurisdiction (the California ISO and [CalPX]).

Id. at 61,511 n. 53, 2001 WL 1704964. The two dissenting FERC commissioners were a bit more blunt: "The refund rules of section 206 of the Federal Power Act are rather specific. If Congress had wanted the Commission to have refund authority over non-public utilities, Congress would have surely so specified. The breathtaking conclusion that this agency has the power to tell non-public utilities to pay money back will come as a shock to most observers." *Id.* at 61,523, 2001 WL 1704964.

The Public Entities, along with other non-public utility sellers, sought rehearing on FERC's refund orders. FERC reiterated its finding that "all sellers, including governmental entities" agreed to accept FERC's single price auction mechanism and are "subject to, FERC jurisdiction regarding

the rates to be received for those sales, including FERC rate and refund orders." 97 FERC ¶ 61,275, at 62,182-83, 2001 WL 1641229 (2001). FERC denied that it was invoking the public interest to override jurisdictional limitations thus "doing indirectly that which we cannot do directly." *Id.* In conclusion, FERC stated that "the subject matter of the sales here provides us with jurisdiction." *Id.* One commissioner dissented on this point. *Id.* at 62,260, 2001 WL 1641229.

STANDARD OF REVIEW

We review de novo the question of whether an agency has exceeded its statutory mandate. *Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir.1999). The two-step *Chevron* analysis applies to FERC's interpretation of the FPA. *Id.* "[T]he first step under *Chevron* is to ask whether 'the intent of Congress is clear.' " *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C.Cir.2005) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). If Congress's intent is clear, we " 'must give effect to the unambiguously expressed intent of Congress,' regardless of the interpretation pressed by the Commission." *Id.* (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). If Congress did not address the "precise question at issue" in this case, "the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

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ANALYSIS

I. THE FPA UNAMBIGUOUSLY EXCLUDES GOVERNMENTAL ENTITIES AND NON-PUBLIC UTILITIES FROM FERC'S REFUND AUTHORITY

We must first consider whether the FPA clearly addresses FERC's authority to order refunds from governmental entities/non-public utilities that sold electric energy in the markets operated by CalPX and ISO. To determine whether Congress spoke directly to the precise question at issue, we apply the traditional tools of statutory interpretation. *See, e.g., Irvine Med. Ctr. v. Thompson,* 275 F.3d 823, 828-30 (9th Cir.2002).

The dispute centers on whether the general applicability of the FPA to "the sale of electric energy at wholesale in interstate commerce," contained in § 201(b)(1), overrides more specific FPA provisions that exclude non-public utilities and governmental entities from FERC's authority to enforce just and reasonable rates and to order refunds. *See* §§ 201(f), 205, and 206.

The import of these provisions is clear. Congress was careful to specify which utilities fall within the definition of "public utility." Even though governmental and municipal utilities are public in normal parlance, they are not "public utilities" under the FPA.

FERC derives its refund authority from subchapter II of the FPA, which governs the regulation of electric utility

companies engaged in interstate commerce. Two discrete aspects of subchapter II inform our analysis and cabin FERC's authority: 1) section 201(f)'s exemption for governmental entities, and 2) section 201(e)'s definition of "public utility" and the limitation of certain authority to public utilities in sections 205 and 206. With this backdrop in mind, we now examine the role these provisions play in determining the scope of FERC's jurisdiction.

A. SECTION 201(f)

Section 201(f) of the FPA provides that governmental entities are not subject to the provisions of subchapter II of the FPA unless specifically stated in the relevant provision:

> (f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt
>
> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, *unless such provision makes specific reference thereto.*

FPA § 201(f) (emphasis added).

The sweep of this exemption is huge. Nothing in subchapter II applies to the United States or any state, including any political subdivision, unless the statute makes specific reference to any of these entities. By way of shorthand, this exemption is generally viewed as applicable to "governmental entities." Each of the utilities here, except AEPCO,[4] falls within the general exclusion. The BPA is an agency of the United States,[5] and the SWC is an instrumentality of the state of California.[6] The remaining

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4. AEPCO is a non-profit rural electric generation and transmission cooperative that obtained some of its financing through the Rural Utilities Service ("RUS"), and is subject to a RUS mortgage under the federal Rural Electrification Act of 1936. *Sierra Southwest Coop. Servs., Inc.*, 95 FERC ¶ 61,310, at 62,057 (2001). We agree with the D.C. Circuit's conclusion in *City of Paris v. Fed. Power Comm'n*, 399 F.2d 983, 986 (D.C.Cir.1968), that Rural Electrification Administration (now RUS)-financed cooperatives are not government instrumentalities for the purposes of § 201(f) because "[t]hey are neither operated nor controlled by any government, federal, state or local."

5. 16 U.S.C. § 832a(a). The BPA is a federal agency within the Department of Energy and a government seller of power whose rates are regulated by the Northwest Power Act, 16 U.S.C. §§ 839-839g—not the FPA. Because BPA falls within § 201(f)'s exemption of all governmental entities, we need not address BPA's additional arguments regarding its status under the Northwest Power Act.

6. *See* www.publicaffairs.water.ca.gov/swp/contractors_intro.cfm (last visited July 5, 2005). Further, the SWC does not fall within the definition of a public utility because it does not own or operate facilities subject to the jurisdiction of FERC.

utilities are each classified as a "municipality"[7] as defined in § 3(7) of the FPA (16 U.S.C. § 796(7)). A municipality is, of course, a "political subdivision of a State." *See* FPA § 201(f). A search of subchapter II for specific reference to FERC's jurisdiction over governmental entities for refund purposes comes up empty-handed for FERC.

It is also significant that Congress did in fact specify particular provisions of subchapter II as applicable to governmental entities for limited purposes. Sections 210-213 (16 U.S.C. §§ 824i-824l) of the FPA refer to "electric utilities," which are defined as "any person or State agency (including any municipality) which sells electric energy." FPA § 3(22) (16 U.S.C. § 796(22)). As elaborated below, this definition is broader in scope than the definition of "public utility." *See* FPA § 201(e) (16 U.S.C. § 824(e)). Congress was mindful, however, to establish that the regulatory authority over governmental entities contained in these provisions of the FPA should not be construed to subject such electric utilities to the general jurisdiction of FERC:

> The provisions of sections [210, 211 and 212] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions.

7. A "municipality" is defined as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

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> Compliance with any order of the Commission under the provisions of section [210 or 211], *shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.*

FPA § 201(b)(2) (16 U.SC. § 824(b)(2)) (emphasis added).

When Congress wanted a provision of FPA subchapter II to apply to governmental entities, it knew how to so specify. To its credit, FERC does not try to duck the clear import of the statutory requirement; rather, FERC argues that we should ignore the identity of the sellers and look instead to the subject matter—FERC's broad powers over wholesale sales of electric energy under FPA § 201(b)(1), which states that the FPA applies to "the sale of electric energy at wholesale in interstate commerce." This argument ignores a basic principle of statutory construction, namely that the specific prevails over the general. *See Santiago Salgado v. Garcia,* 384 F.3d 769, 774 (9th Cir.2004) (holding a specific statutory provision will control a general one). FERC's approach could also render a nullity multiple provisions of the FPA. For example, § 201(f) would be unnecessary. If FERC could invoke plenary jurisdiction over "the sale of electric energy," then Congress could have saved time and ink by not bothering to narrow that jurisdiction. And § 201(b)(2), which makes clear that FERC does not have broad jurisdiction over electric utilities, would have been superfluous.

B. SECTIONS 205 AND 206

The second limitation on FERC's jurisdiction stems from the definition of "public utility" and the unambiguous dictate of §§ 205 and 206 that those sections apply only to public utilities.

Before looking at the scope of FERC's refund authority, it is important first to identify the statutory provision in subchapter II that defines "public utility."

> The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

FPA § 201(e) (16 U.S.C. § 824(e)). The FPA's definition of "person" does not include municipalities or state agencies. "Person" means an "individual or a corporation," FPA § 3(4) (16 U.S.C. § 796(4)), and the definition of "corporation" specifically excludes "municipalities," FPA § 3(3) (16 U.S.C. § 796(3)). As noted earlier, "municipality" includes cities, counties, irrigation and drainage districts, and other state agencies and subdivisions that are in the power business. FPA § 3(7). Under these definitions, none of the municipal/state Public Entities is categorized as a "public utility" because they are not individuals and because municipalities and state agencies are specifically excluded from the definition of corporation. We have no reason to consider

BPA's status under these provisions as there is no question that it is exempt as an agency of the United States under § 201(f).

We diverge for a moment to consider the status of AEPCO, which requires a more detailed analysis of its classification as a non-public utility. Pursuant to *Dairyland Power Coop.*, 37 FPC 12 (1967), FERC does not consider AEPCO to be a "public utility" within the Commission's FPA jurisdiction. *See Sierra Southwest Coop. Servs.*, 95 FERC ¶ 61,310, at 62,057 n. 7, 2001 WL 34076863 (2001) (explaining that AEPCO, a RUS-financed cooperative, is not a public utility under the FPA). Based on *Dairyland* and *Sierra Southwest,* AEPCO appears to fall outside FERC's § 206(b) refund authority because it is not a public utility and § 206(b) refers only to public utilities.

Nonetheless, FERC urges us to hold that AEPCO is a public utility. FERC relies on equivocal language in a D.C. Circuit decision that suggested some RUS-financed cooperatives could be considered public utilities. In deferring to FERC's conclusion in *Dairyland* that RUS-financed cooperatives generally are not public utilities, the D.C. Circuit stated in a footnote that

> [i]f the Commission had found that conditions in the power industry had so changed that generating cooperatives now did fall within its jurisdiction, this court would be faced with a different issue. For just as the Commission's determination here that it is without jurisdiction is entitled to judicial

deference, so would be its determination that it had the requisite authority.

Salt River Project Agric. Improvement and Power Dist. v. Fed. Power Comm., 391 F.2d 470, 474 n. 8 (D.C.Cir.1968) (internal citation omitted). The D.C. Circuit noted that RUS-financed cooperatives "do seem to fall within the ambit of the [FPA's] central phrase, 'public utilities,' " *id.* at 474, but agreed with FERC that the legislative history surrounding the FPA and Rural Electrification Act permitted it to defer to FERC's conclusion that Congress did not intend to regulate cooperatives through the FPA as public utilities. *Id.* at 475-77.

FERC has, until its appellate brief in this proceeding, treated AEPCO as a non-public utility. FERC has offered nothing in the record to support its change of position nor did its refund orders single out AEPCO for treatment as a public utility. We cannot accept FERC's post-hoc rationalization for ordering refunds from AEPCO.[8]

8. FERC's orders during the California energy crisis specifically treated AEPCO as a non-public utility equivalent to a governmental entity. 99 FERC ¶ 61,160, at 61,660 n. 62 (2002) ("AEPCO also asked for clarification that, for purposes of the December 19 order, RUS-financed cooperatives receive the same treatment as 'governmental entities.' The December 19 order was sufficiently clear that discussions regarding governmental entities include non-public utilities such as RUS-financed cooperatives."). A February 2005 FERC order held that "Central Iowa is a Rural Utility Service (RUS)-financed electric cooperative and, thus, is not a Commission-regulated 'public utility' under the FPA." *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,093 (2005). Long after its orders in the California refund cases, FERC continued to treat RUS-financed cooperatives as non-public utilities.

Consequently, in this proceeding we treat AEPCO as a non-public utility but without prejudice to reclassification by FERC in a different proceeding.

FERC's rate jurisdiction under § 205 and its refund jurisdiction under § 206 expressly apply only to public utilities, again reinforcing the definitional and scope provisions of the statutory scheme. For example, § 205's requirement that all rates for sales of electric energy must be "just and reasonable" applies only to public utilities and includes no specific reference to governmental entities as would be required to escape the broad exemption in § 201(f). FPA § 205(a) (16 U.S.C. § 824d(a)) ("All rates and charges made, demanded, or received by *any public utility* for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." (emphasis added)).

Notably, FERC's authority under §§ 206(a) and (b) to investigate rates and to order refunds for unjust and unreasonable rates is limited to "any rate, charge, or classification, demanded, observed, charged, or collected by *any public utility* for any transmission or sale subject to the jurisdiction of the Commission"; again, no specific reference is made to governmental entities or non-public utilities. FPA § 206(a)(16 U.S.C. § 824e(a)) (emphasis added); *see also* FPA § 206(b) (16 U.S.C. § 824e(b)) ("At the conclusion of any proceeding under this section, the Commission *may order the public utility to make refunds* of any amounts paid, . . .

in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, ..." (emphasis added)).

Again, FERC attempts to counter the clear language of the FPA by shifting the analysis away from the identity of the sellers, and focusing instead on the nature of their transactions and the markets and tariffs under which these transactions were conducted. FERC acknowledged in its July 25, 2001 Order that "we do not have direct regulatory rate authority over power sales by non-public utilities," 96 FERC ¶ 61,120, at 61,511, 2001 WL 1704964 (2001), but concluded that it could still reach the sales of the Public Entities. FERC emphasizes that ISO and CalPX were public utilities that operated FERC-jurisdictional wholesale electricity markets and had FERC-approved tariffs and that the sales in the ISO and PX markets, whether by public utilities or governmental entities/non-public utilities, involved wholesale sales of electric energy in interstate commerce that are within FERC's § 201(b)(1) jurisdiction. *Id.* at 61,513 ("[T]he [Public Entities' transactions], wholesale sales of energy in interstate commerce, were governed by FERC-approved rules and a FERC-jurisdictional ISO and [CalPX]. Those transactions thus fell within FERC's jurisdiction regardless of the jurisdictional nature of the sellers or buyers.").

FERC relies on these observations about the jurisdictional status of the ISO and CalPX and their markets to reach around the limits of § 201(f):

> While [FPA § 201(f)] exempts governmental entities generally from Commission jurisdiction

> under Part II of the FPA, it does not do so under the specific circumstances here. Here, governmental entities and others sold energy in a centralized, single clearing price auction market under which all sellers received the same price for a given sale, pursuant to market rules set by this Commission and administered by public utilities (the California PX and ISO) subject to this Commission's jurisdiction. The involvement of the PX and ISO, whose roles are central in these California spot markets, along with the nature of the interstate wholesale sales, give us subject matter jurisdiction entirely independent of the jurisdictional nature of the entities selling into the markets at issue. Thus, FPA section 201(f) does not change the analysis or the result in determining whether we have subject matter jurisdiction over the sales at issue.

97 FERC ¶ 61,275, at 62,181-82, 2001 WL 1641229 (2001).

FERC attempts to deflect our attention away from the fact that it is ordering refunds from the Public Entities by arguing that FERC is simply using its §§ 205 and 206 authority to reset the prices of the single-price auction to a just and reasonable level:

> Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales. In this context, we see no reason to treat non-public utility sellers differently, as they are receiving the same price, the just and

> reasonable market clearing price established pursuant to market rules approved by this Commission, that they expected to obtain for their wholesale sales into the centralized ISO and PX spot markets.

96 FERC ¶ 61,120, at 61,512 (2001); *see also* 97 FERC ¶ 61,275, at 62,182, 2001 WL 1641229 (2001). ISO similarly tries to cast FERC's orders as resetting the market clearing price under FERC-jurisdictional tariffs and characterizes the refunds by the Public Entities as just a "byproduct" of the resettlement of the ISO and CalPX markets.

The rationale advanced by FERC and ISO is flawed. Perceiving FERC's orders as effecting a reset market clearing price for all spot market sales under the ISO and CalPX tariffs, rather than as an order for refunds under § 206(b), ignores the explicit language of FERC's July 25, 2001 Order:

> The Commission has determined that all sellers of energy in the California ISO and PX spot markets should be subject to refund liability for the period beginning October 2, 2000. We have decided to extend refund liability to public and non-public utility sellers based on our review of the controlling law, the involvement of both types of sellers in the California centralized ISO and PX spot markets, and the equities of the situation.

96 FERC ¶ 61,120, at 61,511, 2001 WL 1704964 (footnote omitted). We cannot conclude that FERC said "refund" but meant resettlement of the market-clearing price.

FERC's order does more than simply reset the market-clearing price for power in the FERC-jurisdictional ISO and CalPX markets. FERC specifically ordered governmental entities/non-public utilities to pay refunds, an action that lies outside Congress's clearly expressed intent that FERC's § 206 refund authority should apply only to public utilities. In addition, the fact that ISO and CalPX were public utilities is irrelevant because FERC is ordering refunds from the governmental entities/non-public utilities, not ISO or CalPX themselves. Indeed, it would be one thing for FERC to order CalPX and ISO to operate the market in a different fashion or to set a market-clearing price for power on a going-forward basis, but the retroactive imposition of a market price that effects a refund responsibility is a regulatory action that falls outside of FERC's jurisdiction with respect to non-public utilities and governmental entities.

FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC's authority over governmental entities, *see* § 201(f), and limit FERC's authority to ensure just and reasonable rates and to order refunds to "public utilities," *see* §§ 205, 206(b). In sum, the text and structure of the FPA are unambiguous: *Chevron* deference is not due where FERC's authority to order refunds under § 206(b) is specifically limited to "public utilities" and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f).

FERC tries to escape the clear dictates of the statute by referring to the FPA's legislative history. This effort is

unavailing. Legislative history cannot trump the statute. *See Am. Rivers,* 201 F.3d at 1204 ("[W]e are mindful that this Court steadfastly abides by the principle that 'legislative history—no matter how clear—can't override statutory text.' ") (quoting *Hearn v. W. Conference of Teamsters Pension Trust Fund,* 68 F.3d 301, 304 (9th Cir.1995) (citations omitted); *see also Columbia Gas Transmission Corp.,* 404 F.3d at 461) (noting that we " 'must give effect to the unambiguously expressed intent of Congress,' regardless of the interpretation pressed by the Commission") (quoting *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778).

In any event, FERC's own interpretation of the legislative history in a previous administrative order belies its argument in this case. In a 1998 FERC proceeding, when asked to interpret § 201(f)'s legislative history, FERC concluded that Congress deliberately put governmental entities, such as states and municipalities, outside of FERC's jurisdiction:

> The legislative history of the FPA shows clearly that Congress was deliberate and careful in its efforts not to impose FPA public utility regulation on states and municipalities, even if they transmitted power across state lines. The Senate Report on the bill, for example, stated, "The revision has also removed every encroachment upon the authority of the States," and noted that a new subsection 201(e) [which later became 201(f)] "has been added to remove all doubt that the act is not to apply to public projects, Federal, State, or municipal."

New West Energy Corp., 83 FERC ¶ 61,004, at 61,018, 1998 WL 146648 (1998) (footnotes omitted) (alteration in original). Although, as FERC now argues,[9] the motivation behind § 201(f) in 1935 may have been to prevent government-owned utilities from gaining a competitive advantage over private utilities, Congress unambiguously removed government-owned utilities from FERC's refund jurisdiction.[10]

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9. FERC quotes the following portion of the Senate Report:

> [Subsection (f)] has been added to remove all doubt that the act is not to apply to public projects, Federal, State or municipal. Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants. This new subsection carries out in unmistakeable terms the original intention of the bill in this respect.

S. Rep. No. 74-621, at 19 (1935). Whatever the intention in terms of protecting private utilities, both the statutory language and this paragraph are at odds with FERC's position in this proceeding.

10. Although we do not read too much into legislative amendments occurring after the FERC decision in this case became final, we note that in August 2005, Congress passed legislation to amend FERC's § 206 refund authority. The legislation amends § 206 to extend FERC's refund authority to entities described in § 201(f) if the entity makes a voluntary, short term sale of electricity through an organized market in violation of FERC rules or tariffs. The new authority does not apply to cooperatives or to municipal or Federal

(Cont'd)

II. FERC'S PRIOR CONTROLLING INTERPRETATION OF ITS AUTHORITY UNDER FPA §§ 205 AND 206 IS CONSISTENT WITH A PLAIN READING OF THE FPA

Although we recognize that the California energy crisis was extraordinary, the fact remains that it does not alter FERC's statutory authority. It should be obvious that FERC cannot invoke a "one-time" rule for this circumstance. FERC's long-standing interpretation of §§ 205 and 206 confirms that governmental entities/non-public utilities lie outside its rate-making and refund authority.

As referenced above, FERC concluded in *New West Energy* that Congress expressed its clear intent through § 201(f) that the FPA was to " 'subject private enterprise alone to regulation by the Federal Power Commission, and not to extend that regulation to government and its instrumentalities.' " 83 FERC ¶ 61,004, at 61,018 (1998). New West Energy, a governmental entity, sought § 205 approval from FERC to sell electric energy at market-based

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utilities that sell less than 8 million MWh of electricity per year. Energy Policy Act of 2005, Pub.L. No. 109-58, § 1286, 119 Stat. 594, 981 (2005); *see also* S.Rep. No. 109-78, at 52 (2005); 151 Cong. Rec. H6969 (daily ed. July 28, 2005) (statement of Rep. Barton, Conference Committee Chairman). This amendment suggests that because existing law did not permit FERC to order refunds from governmental entities, Congress felt the need to create an exemption to § 201(f) and limited that exemption to governmental entities selling large quantities of power. In any event, the adoption of this amendment comports with our interpretation of the FPA.

rates. FERC refused to exercise its § 205 rate authority over New West Energy, even with New West Energy's consent, because §§ 205 and 206 do not extend FERC's authority to governmental entities:

> The statute is thus clear that Part II of the FPA, which contains Sections 205 and 206, shall not apply to any political subdivision of a state or any corporation wholly owned by a political subdivision of a state, unless the provision makes specific reference thereto. Sections 205 and 206 provide the Commission authority over the rates, terms, and conditions of jurisdictional service by public utilities. Those sections do not make reference to the entities listed in Section 201(f).

Id. at 61,015. We see no justification for reading §§ 201(f), 205, and 206 any differently in this case.

In a proceeding even more analogous to this case than *New West Energy*, FERC again emphasized that its § 206 refund authority did not apply to governmental entities/non-public utilities. In *Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135, 1999 WL 985410 (1999) ("*MAPP*"), Enron Power Marketing, Inc., sought refunds from both public utility and non-public utility members of a transmission power pool operating under a joint open-access transmission tariff. FERC refused to order refunds from one of the governmental entities that was a member of the power pool:

> [W]e address Nebraska District's request that we clarify that the Commission's refund direction in

> the April Order does not apply to nonpublic utility members of a power pool. We note that Nebraska District, as a utility owned and operated by the State of Nebraska, is not a public utility under the FPA. Therefore, we cannot assert jurisdiction over Nebraska District, and the requirements in our April Order apply only to the public utility members of MAPP (since they are within our jurisdiction).

Id. at 61,387, 1999 WL 985410 (footnotes omitted).[11]

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11. FERC reiterated its refusal to order refunds under § 206 from the Nebraska District in two subsequent decisions in the *MAPP* case: "The tariffs and agreements on file with us are subject to our jurisdiction. MAPP's jurisdictional public utility members are subject to our jurisdiction, but Nebraska District is not. Therefore, when we ordered MAPP to make refunds we clearly meant MAPP, on behalf of its jurisdictional public utility members." 92 FERC ¶ 61,229, at 61,755, 2000 WL 1342515 (2000). In another order, FERC stated:

> The Commission clarifies that its prior orders found that MAPP had overcharged transmission customers served under its jurisdictional transmission tariff and that full refunds were owed by MAPP. However, because Nebraska District, although a member of the pool and a party to the Restated Agreement, refused to pay refunds and is not subject to our jurisdiction as a public utility under Sections 205 and 206 of the FPA, we recognized that we cannot enforce the refunds requirement against Nebraska District.

91 FERC ¶ 61,353, at 62,182, 2000 WL 876869 (2000).

Similar to the situation in the *MAPP* proceedings, here both public utilities and governmental entities/non-public utilities were selling electric energy in the wholesale markets operated by ISO and CalPX. Just as in *MAPP,* FERC's § 206 refund authority extends only to the public utilities selling in the ISO and CalPX wholesale markets. FERC's long-standing interpretation of its authority under § 206 reinforces the clear and unambiguous intent of Congress—governmental entities/non-public utilities lie outside FERC's jurisdiction even when engaged in wholesale sales of electric energy.

III. THE UNITED DISTRIBUTION COMPANIES CASE IS NOT APPLICABLE

Other than FERC's own new-found interpretation of its refund authority under § 206, the only significant legal authority the Commission points to is the D.C. Circuit's decision in *United Distribution Cos. v. FERC,* 88 F.3d 1105 (D.C.Cir.1996) ("*UDC*"), which construed the jurisdictional provisions of the Natural Gas Act. Although this case provides some support for FERC's argument, it is no small matter that it involved a completely different statute, and it falls far short of persuading us of FERC's position.

FERC claims that *UDC* supports its focus on the subject matter of the transactions and the central role of CalPX and ISO in the California markets, rather than the identity of the sellers, as grounds for exercising refund authority. In *UDC,* which involved interpretation of the Natural Gas Act and FERC's gas pipeline regulations, the court upheld FERC's requirement that municipalities must comply with FERC's

capacity release regulations when they purchase transportation capacity on a FERC-jurisdictional interstate pipeline and then seek to release, or resell, any unused capacity. 88 F.3d at 1149-50, 1154. The Natural Gas Act includes provisions similar to the FPA that extend FERC's jurisdiction over only "natural-gas companies" and over interstate transportation of natural gas with municipalities typically lying beyond the reach of FERC's jurisdiction. *Id.* at 1153-54. The court concluded, however, that FERC could require municipalities to comply with its capacity release regulations, relying on the subject matter of the transactions and the central role of a jurisdictional pipeline in the capacity transactions:

> FERC may, consistent with the [Natural Gas Act], require municipalities to comply with its capacity release regulations. As we explained above, . . . FERC's transportation jurisdiction extends as a separate matter over capacity release given the involvement of interstate gas *pipelines*. The pipelines' role in capacity release is absolutely central, and the transaction itself controls access to interstate transportation capacity, entirely independent of the jurisdictional nature of the releasing and replacement shippers.

Id. at 1154 (footnotes omitted).

The D.C. Circuit's focus on the jurisdictional nature of the subject matter of the transaction—transportation of natural gas in interstate commerce—and the central role of a FERC-jurisdictional pipeline does not translate to the same

result here. Significantly, the Natural Gas Act does not include a provision analogous to FPA § 201(f), which exempts governmental entities. Furthermore, *UDC* did not involve the question whether FERC may order refunds from governmental entities. *UDC* therefore does not provide a framework that permits FERC to ignore the clear language of the FPA. The FPA clearly states in § 201(f) that the provisions of subchapter II of the FPA, including FERC's §§ 205 and 206 rate and refund authority, do not apply to governmental entities unless the governmental entities are specifically referenced. Section 206 only gives FERC the authority to order refunds from public utilities.

IV. THE PARTIES MAY NOT WAIVE THE LIMITS OF FERC'S STATUTORY AUTHORITY

FERC also attempts to avoid the § 201(f) restrictions on refund authority by employing inapt analogies to civil jurisdiction doctrines. FERC characterizes its § 201(b)(1) authority to regulate wholesale sales of electric energy in interstate commerce as "subject matter jurisdiction," and characterizes the restrictions in § 201(f) as restrictions on its "personal jurisdiction." According to FERC, the Public Entities waived any restriction on FERC's authority to order refunds from the governmental entities/non-public utilities because they voluntarily participated in markets that were governed by FERC-approved tariffs and agreements:[12]

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12. FERC's waiver argument offers more than a little irony given FERC's consistent position-until the ultimate refund order-that it did not have jurisdiction over governmental entities/non-public utilities.

> Moreover, governmental entities that made sales in the [CalPX] and ISO spot markets waived any exemption they otherwise may have had from the Commission's personal jurisdiction regarding those sales. Because the markets did not exist prior to FERC authorization and operate according to FERC rules, all those who participated in them reasonably had to recognize the controlling weight of FERC authority. . . . All sellers were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change and refund if they were found to be unjust and unreasonable.
>
> . . . [T]he subject matter of the sales here provides us with jurisdiction. As a separate matter, by selling in the [CalPX] and ISO spot markets, the governmental entities waived any personal jurisdictional limitations.

97 FERC ¶ 61,275, at 62,182-83 (2001) (footnotes omitted).

The fact is that FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or out of FERC's jurisdiction. FERC's effort to recast its statutory authority as a question of bifurcated subject matter/personal jurisdiction is without statutory support. As the D.C. Circuit observed in a recent decision, FERC cannot exercise jurisdiction or authority unless authorized by statute, regardless of whether the jurisdiction is exercised without objection or even with the consent of the relevant parties. In *Columbia Gas Transmission Corp. v. FERC*, the key

question was whether FERC "has jurisdiction to compel compliance with the tariff provision [applying to facilities outside FERC's jurisdiction] solely because the tariff was voluntarily filed by the pipeline, even if FERC would not otherwise have jurisdiction over such [facilities]." 404 F.3d at 461 (internal quotation marks omitted). Because the Natural Gas Act specifically provides that FERC's jurisdiction over the transportation and sale of natural gas "shall not apply . . . to the production or gathering of natural gas," 15 U.S.C. § 717(b), the D.C. Circuit rejected FERC's attempt to regulate Columbia's natural gas gathering facilities based on a FERC-approved tariff containing provisions that applied to gathering facilities. *See* 404 F.3d at 462-63. The court pointed out that

> jurisdiction cannot arise from the absence of objection, or even from affirmative agreement. To the contrary, "as a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it." As the Supreme Court has explained, "parties . . . cannot confer jurisdiction; only Congress can." In this case, Congress has clearly declined to do so.

Id. at 463 (internal citations omitted). Simply because Columbia included natural gas gathering facilities in a FERC-approved tariff did not give FERC jurisdiction to regulate such facilities in the face of a contrary statutory mandate. Similarly, FERC cannot expand its statutory authority to reach governmental entities/non-public utilities through § 206(b) simply because such entities voluntarily participated in markets approved by FERC that involved FERC-

jurisdictional wholesale sales of electric energy in interstate commerce.

FERC's decision in the *New West Energy* proceedings bolsters our rejection of FERC's waiver argument. FERC denied New West Energy's attempt to waive limitations on FERC's so-called "personal jurisdiction" in § 201(f):

> [W]e note . . . that an entity that is not a public utility under the FPA cannot volunteer to be one. As we said before with respect to the South Carolina Public Service Authority, which is an authority of the state of South Carolina:
>
> Moreover, because the Commission is prohibited by statute from regulating directly the activities of nonpublic utilities under Sections 205 and 206, the Authority cannot simply waive this restriction and volunteer to become subject to this Commission's jurisdiction under Section 205 and 206.
>
> Likewise, New West cannot be regulated as a public utility simply because it desires to be so regulated.

New West Energy Corp., 83 FERC ¶ 61,004, at 61,015, 1998 WL 146648 (1998) (footnote omitted).[13] We see no distinction

13. *See also South Carolina Pub.*, 75 FERC ¶ 61,209 at 61,696, 1996 WL 283302 (1996) (while FERC agreed to "evaluate non-jurisdictional activities to the extent they affect the Commission's

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between a governmental entity/non-public utility that volunteers to be subject to the Commission's jurisdiction and a governmental entity/ non-public utility that voluntarily participates in a FERC-approved market to make wholesale sales of electric energy in interstate commerce.

In a variation on the waiver argument, FERC and intervenor California Parties[14] emphasize that the Public Entities entered into agreements with ISO and CalPX that obligated them to abide by the ISO and CalPX tariffs. They argue that these agreements made it obvious to the Public Entities that the tariffs setting the prices in the ISO and CalPX markets would be subject to FERC regulation under §§ 205 and 206. All of this is true. But it does not change our conclusion that FERC cannot use § 206(b) to order refunds from governmental entities/non-public utilities, even if the price they received for their electric energy sales was set by the FERC-approved tariff of a public utility.

The focus on the agreements between the Public Entities and ISO and CalPX only serves to demonstrate that the

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jurisdictional responsibilities," FERC emphasized its §§ 205 and 206 rate authority could not apply to South Carolina Public Service Authority as a state agency and the "Authority cannot simply waive this restriction and volunteer to become subject to the Commission's jurisdiction under sections 205 and 206").

14. The California Parties consist of the California Public Utilities Commission, Pacific Gas & Electric Co., San Diego Gas & Electric Co., Southern California Edison Co., California Electricity Oversight Board, and People of the State of California, *ex rel.* Bill Lockyer, Attorney General.

remedy, if any, may rest in a contract claim, not a refund action. Such an approach is not novel, as illustrated by FERC's *MAPP* proceedings and the related cases in federal district and circuit court. MAPP is a power pool that includes both public utility and non-public utility transmission owners. In 1999, FERC concluded that portions of the MAPP tariff violated § 205 and ordered refunds from the MAPP members. 89 FERC ¶ 61,135, at 61,384, 1999 WL 985410 (1999). Although the Commission concluded that it could not order refunds from the Nebraska Public Power District ("Nebraska District"), a governmental entity/non-public utility, the Commission suggested that a contract action might provide a remedy for public utility members of MAPP against the Nebraska District: "However, we need not and do not address whether nonpublic utility members of MAPP are nevertheless bound to take or refrain from taking any actions, including providing refunds, under the terms of any agreement." *Id.* at 61,387-88, 1999 WL 985410.

Later proceedings in federal court illustrate that although FERC had no authority to order the Nebraska District to pay refunds, a contract action brought by parties to the MAPP agreement could result in the equivalent refund relief from the Nebraska District. *Alliant Energy, Inc. v. Neb. Pub. Power Dist.*, Civ. No. 00-2139 ADM/FLN, 2001 WL 1640132, 2001 U.S. Dist. LEXIS 17802 (D.Minn. Oct. 18, 2001), *aff'd*, 347 F.3d 1046 (8th Cir.2003). The district court held that Nebraska District was contractually liable to pay refunds as a result of FERC's orders that changed MAPP's FERC-jurisdictional tariff and the MAPP agreement:

Appendix A

> The Restated Agreement is a contract to which [Nebraska District] is a signatory. [Nebraska District] is bound by the contract regardless of whether FERC has regulatory authority over [Nebraska District] itself. FERC concluded that certain tariff provisions of Schedule F did not comply with Order 888 and that MAPP must revise the Restated Agreement. Accordingly, [Nebraska District] is contractually obligated to refund the amounts it overcollected under the nullified Schedule F tariff provisions, even if the contract amendments resulted from a FERC order.

2001 WL 1640132, at *4, 2001 U.S. Dist. LEXIS 17802, at *14 (footnote omitted). The Eighth Circuit affirmed, noting, "[w]hen a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body. As a result, we are not enforcing the FERC order; instead, we are enforcing an agreement, which [Nebraska District] freely entered." 347 F.3d at 1050 (internal citation omitted).[15]

At bottom, FERC's waiver argument is an effort to have this court restructure the scope of FERC's statutory authority. In declining to do so, we take no position on remedies

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15. *See also W. Sys. Power Pool*, 55 FERC ¶ 61,495, at 62,713, 1991 WL 266439 (1991) (stating that any requirements imposed on the power pool, which included both non-public utility and public utility members, applied only to the public utility members, and that while "nonpublic utility members of WSPP may have agreed by contract to be bound by the WSPP Agreement" it was "not a matter for this Commission under the Federal Power Act").

available outside of the FPA. We hold that FERC does not have refund jurisdiction under FPA § 206 with respect to governmental entities and non-public utilities. The petition for review is GRANTED; we remand to FERC for proceedings consistent with this opinion.

PETITION FOR REVIEW GRANTED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC DATED MARCH 7, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-70262

FERC No. EL00-95-001
District of Oregon,
Portland

BONNEVILLE POWER ADMINISTRATION,

Petitioner,

CITY OF TACOMA; PORT OF SEATTLE; CORAL POWER, L.L.C.; CONSTELLATION ENERGY COMMODITIES GROUP, INC.,

Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

PACIFICORP,

Respondent-Intervenor.

Appendix B

ORDER

Before: THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

Having considered the California parties' arguments, the panel votes to deny the Petition for Rehearing and Petition for Rehearing en banc. The panel opinion does not conflict with the D.C. Circuit's decision in *Pacific Gas & Electric Company v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002). In that case, which arose in a different context under § 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, and did not rest on a jurisdictional analysis under FPA § 201(f), the D.C. Circuit stated that "[a]s a general matter, publicly-owned utilities are not subject to FERC's §§ 205 and 206 jurisdiction, *see* FPA § 201(f), 16 U.S.C. § 824(f), although FERC may analyze and consider the rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions." *Pacific Gas*, 306 F.3d at 1114. The court did not say, or even imply, that FERC may assert jurisdiction over a non-jurisdictional entity for purposes of ordering a refund. The parties' other claim of a circuit conflict with *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), is no more persuasive, as we explained earlier in the panel opinion.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX C — ORDER ISSUED JULY 25, 2001

FEDERAL ENERGY REGULATORY COMMISSION

96 FERC ¶ 61,120 (2001)

San Diego Gas & Electric Company, Complainant v. Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, Respondents.

Investigation of Practices of the California Independent System Operator and the California Power Exchange

Puget Sound Energy, Inc., Complainant v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, Respondents

Docket Nos. EL00-95-004, EL00-95-005, EL00-95-019, EL00-95-031
Docket Nos. EL00-98-004, EL00-98-005, EL00-98-018, EL00-98-030
Docket Nos. EL01-10-000, EL01-10-001

ORDER ESTABLISHING EVIDENTIARY HEARING PROCEDURES, GRANTING REHEARING IN PART, AND DENYING REHEARING IN PART

Before Commissioners: Curt Hèbert, Jr. Chairman; William L. Massey, Linda Breathitt, Pat Wood, III and Nora Mead Brownell.

(Issued July 25, 2001)

This order establishes the scope of and methodology for calculating refunds related to transactions in the spot markets operated by the California Independent System Operator

Corporation (ISO) and the California Power Exchange Corporation (PX) during the period October 2, 2000 through June 20, 2001. The Commission makes clear that transactions subject to refund are limited to spot transactions in the organized markets operated by the ISO and PX during the period October 2, 2000, through June 20, 2001, and include sales by public and non-public utilities into these markets. The order also establishes an evidentiary hearing proceeding in order to further develop the factual record in Docket No. EL00-95-031, *et al.*, so that refunds may be calculated. The order grants rehearing in part and denies rehearing in part of limited portions of earlier orders issued in this proceeding. In addition, the Commission establishes another proceeding before an Administrative Law Judge to explore whether there may have been unjust and unreasonable charges for spot market sales in the Pacific Northwest from December 25, 2000 through June 20, 2001, and the calculation of any refunds associated with such charges.

Background

In an order issued August 23, 2000,[1] the Commission instituted formal hearing proceedings under section 206 of the Federal Power Act (FPA) to investigate the justness and reasonableness of the rates for energy and ancillary services of public utility sellers into the ISO and PX spot markets, and also to investigate whether the tariffs, contracts, institutional structures, and bylaws of the ISO and PX were adversely affecting the wholesale power markets in California. In instituting an investigation into the reasonableness of the rates charged, however, the Commission denied a request by San Diego Gas and Electric

1. *San Diego Gas & Electric Company, et al.*, 92 FERC ¶ 61,172 (2000), *reh'g pending* (August 23 Order).

Company (SDG&E) contained in SDG&E's complaint against all sellers of energy and ancillary services into the ISO and PX markets subject to the Commission's jurisdiction, that the Commission impose a $250 price cap for sales into those markets. The Commission denied this request in the August 23 Order, on the grounds that SDG&E had not provided sufficient evidence to support an immediate seller's price cap.[2] The Commission established a refund effective date of 60 days after publication of notice in the *Federal Register* of the Commission's intent to institute a proceeding.[3]

The Commission issued an order on November 1, 2000 finding that the "electric market structure and market rules for wholesale sales of electric energy in California were seriously flawed and that these structures and rules, in conjunction with an imbalance of supply and demand in California, have caused, and continue to have the potential to cause, unjust and unreasonable rates for short-term energy . . . under certain conditions."[4] The order noted that, "[w]hile this record does not support findings of specific exercises of market power, and while we are not able to reach definite conclusions about the actions of individual sellers, there is clear evidence that the California market structure and rules provide the opportunity for sellers to exercise market power when supply is tight, and can result in unjust and unreasonable rates under the FPA."[5]

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2. 92 FERC at 61,606.

3. *Id.* at 61,608.

4. *San Diego Gas & Electric Company, et al.*, 93 FERC ¶ 61,121 at 61,349-50 (2000), *reh'g pending* (November 1 Order).

5. *Id.* at 61,350.

To deal with these flaws, the November 1 Order proposed remedies intended to reduce over-reliance on spot markets in California, and attempted "to balance, on the one hand, holding overall rates to levels that approximate competitive market levels for the benefit of consumers, with, on the other hand, inducing sufficient investment in capacity to ensure adequate service for the benefit of consumers."[6] The November 1 Order changed the refund effective date contemplated in the August 23 Order from 60 days after publication of notice in the *Federal Register*, October 29, 2000, to 60 days after the date of SDG&E's complaint, October 2, 2000. The order also contained extensive discussion of the Commission's authority to direct refunds, for the periods both before and after the refund effective date, and concluded that the Commission is not authorized by the FPA to order refunds prior to the October 2 refund effective date. Several parties sought rehearing of this aspect of the November 1 Order.[7]

The Commission adopted many of the proposed remedies presented in the November 1 Order in an order issued December 15, 2000.[8] The December 15 Order reiterated the

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6. *Id.*

7. *See, e.g.*, requests for rehearing of the California Electricity Oversight Board (Oversight Board), the Public Utilities Commission of the State of California (California Commission), PG&E, SoCal Edison, and the City of San Diego. Other determinations in the November 1 Order are also pending rehearing; these issues will be addressed in a future order.

8. *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000), *reh'g pending* (December 15 Order)

earlier findings that the market structures and rules for wholesale sales of electric energy in California were seriously flawed and that these structures and rules, in conjunction with an imbalance of supply and demand in California, had caused, and continued to have the potential to cause, unjust and unreasonable rates for short-term energy under certain conditions. The Commission, therefore, established a variety of remedies for the California wholesale electric markets, including, in part: (1) eliminating the requirement that the IOUs sell all of their generation into and buy all their energy needs from the PX so as to terminate the over reliance on spot markets; (2) adopting an advisory benchmark for assessing prices of long-term electric supply contracts in order to provide guidance for market participants to evaluate the reasonableness of long-term prices; (3) requiring market participants to preschedule 95 percent of their load prior to real time and penalizing those who do not, so as to eliminate market participants' chronic underscheduling with the ISO; and (4) requiring an independent governing board for the ISO.

As an interim measure, the Commission also established a $150/MWh breakpoint under which public utility sellers bidding above the breakpoint receive their actual bids, but are subject to monitoring and reporting requirements to ensure that rates remain just and reasonable, including the potential for having to pay refunds for prices charged above the breakpoint. The December 15 Order also required the development of a longer term mitigation plan to replace the interim breakpoint methodology by May 1, 2001. In a separate order, the Commission established a settlement conference to facilitate forward contracting by California

investor owned utilities.[9] The Chief Administrative Law Judge convened discussions over five days in December 2000 and January 2001.

On January 23, 2001, the Director of the Division of Energy Markets in the Office of Markets, Tariffs and Rates convened a technical conference to develop a plan to replace the interim $150/MWh break-point price. Comments and reply comments on how to replace the interim break-point were filed with the Commission. In March 2001, Commission Staff issued a recommendation for prospective market monitoring and mitigation for the real-time electric market, and comments were filed on this proposal.

On March 9, 2001, the Commission issued an order addressing above-breakpoint transactions that occurred in January.[10] The March 9 Refund Order directed refunds from sellers for transactions occurring during Stage 3 Emergencies (when ISO reserves fell below 2.5 percent) above a proxy market clearing price ($273/MWh for that month), or alternatively, required sellers to submit additional cost or other justification for those transactions.[11] Parties requested

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9. *Forward Contracting by California Utilities*, 93 FERC ¶ 61,295 (2000).

10. *San Diego Gas & Electric Co., et al.*, 94 FERC ¶ 61,245 (2001), *reh'g pending* (March 9 Refund Order).

11. The Director of the Office of Markets, Tariffs and Rates issued notices announcing the proxy market clearing prices for the months of February, March, April, and May 2001 on March 16, April 16, May 14, and June 15, respectively.

rehearing of the March 9 Refund Order on many grounds. Among those were PG&E, SDG&E, and SoCal Edison's objections to the Commission's conclusion that it has no authority to order non-public utility sellers to make refunds.[12] Additionally, numerous parties argued that price mitigation should apply during all hours.[13]

On April 26, 2001, the Commission issued its order adopting a prospective monitoring and mitigation plan for wholesale sales through the organized real-time markets operated by the ISO.[14] The Commission's plan, in pertinent part, enhanced the ISO's ability to coordinate and control planned outages during all hours; required certain sellers to offer the ISO all their available power in real time during all hours; established conditions, including refund liability, on public utility sellers' market-based rate authority to prevent anti-competitive bidding behavior in the real-time ISO markets during all hours; and established a mechanism for price mitigation for all sellers (excluding out-of-state generators) bidding into the ISO's organized markets for real-time sales during system emergencies. In the April 26 Order, the Commission also established an inquiry into whether a price mitigation plan similar to the one for the California

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12. *See* March 9 Refund Order, 94 FERC at 61,864.

13. *See, e.g.*, Rehearings of California Commission, ISO, SDG&E, City of San Diego, County of San Diego, and PG&E. Other determinations in the March 9 Order are also pending rehearing; these issues will be addressed in a future order.

14. *San Diego Gas & Electric Company, et al.*, 95 FERC ¶ 61,115 (2001), *reh'g pending* (April 26 Order).

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ISO's organized spot markets should be implemented in the Western Systems Coordinating Council (WSCC) and invited comment on how such a plan should be structured.

On June 19, 2001, the Commission expanded the price mitigation plan on rehearing, imposing curbs not only on California ISO organized spot market sales during all hours, but also constraining prices for bilateral spot market sales throughout the WSCC for the period June 20, 2001 through September 30, 2002.[15] The order retained the use of a single price auction and must-offer and marginal cost bidding requirements when reserves are below 7 percent in the California ISO spot markets. Under the plan, the ISO market clearing price will also serve as a limit on prices in all other spot market sales in the WSCC during reserve deficiencies in California. Sellers in all spot markets in the WSCC will receive up to the clearing price without further justification. Sellers other than marketers will have the opportunity to justify prices above the market clearing price during reserve deficiency hours.

In the June 19 Order, the ISO market clearing price for reserve deficiency hours was also adapted for use in all Western spot markets when reserves are above 7 percent. Prices during non-reserve deficiency hours cannot, absent justification, exceed 85 percent of the highest hourly clearing price that was in effect during the most recent Stage 1 reserve deficiency period (*i.e.*, when reserves are below 7 percent) called by the ISO. These measures were applied to non-public

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15. *San Diego Gas & Electric Company, et al.*, 95 FERC ¶ 61,418 (2001), *reh'g pending* (June 19 Order).

utility sellers as well as public utilities to the extent they voluntarily sell power in the ISO or other WSCC spot markets or voluntarily use the ISO's or other Commission-jurisdictional interstate transmission facilities elsewhere in the WSCC.

In addition, the Commission announced that it would hold a settlement conference before an Administrative Law Judge in order to resolve refund issues for past periods, among other things. The Commission's Chief Judge convened the conference from June 25 through July 9, 2001.

Chief Judge's Report and Recommendation

On July 12, 2001, the Chief Judge issued a report detailing his efforts to forge a settlement among the parties.[16] He explains that, while a global settlement agreement was not achieved, he believes that the negotiations were constructive. The Report finds that refunds owed to purchasers of electricity "amount to hundreds of millions of dollars, probably more than a billion dollars in aggregate sum," although not the $8.9 billion claimed by the State of California.[17] The Report mentions offers made by several sellers into the California market totaling $703.6 million, contingent upon reaching a global settlement of all issues.

According to the Report, efforts were hampered by incomplete data. The Chief Judge had requested the parties

16. *San Diego Gas & Electric Company, et al.*, 96 FERC ¶ 63,007 (2001) (Report).

17. *Id.*, slip op. at 3.

to provide, among other things: (1) the terms and prices of all forward contracts; (2) the amounts that California Department of Water Resources (DWR), the IOUs, and the ISO believe they owe to sellers; and (3) system load figures broken down by component. These data were not made available in their entirety. The Report also notes that the Pacific Northwest Parties did not have data on the amount of refunds due them nor balances past due from purchasers. For these and other reasons, the Chief Judge was not able to determine the total volume of the spot market, nor were parties able to agree about the size of the market subject to the June 19 Order. The Report concludes that the differences between what the State and the sellers believe should be refunded raise material issues of fact. Further, the Report states, "[t]he appropriate numbers to calculate potential refunds involve factual disputes."[18] Thus, the Chief Judge recommends that the Commission order a trial-type evidentiary hearing limited to developing a factual record against which to apply a refund methodology.

The Chief Judge's recommended refund methodology would begin with the price mitigation approach set forth in the June 19 order, with several modifications for dealing with past, as opposed to future, transactions. Key differences include: (1) using actual, rather than hypothetical, heat rates; (2) using daily spot gas prices rather than monthly bid-week prices; (3) separating the state's gas market into northern and southern zones; (4) excluding emission costs from the market clearing price and treating them as an additional expense that may be subtracted from refund calculations; and (5) not using the 85 percent price ceiling for non-emergency

18. *Id.*, slip op. at 5.

hours, and instead recalculating each hour to determine the amount by which actual prices exceeded the mitigated price. The Chief Judge recommends retaining the 10 percent credit adder for sales after January 5, 2001, and not including interest unless the refund amount exceeds payments that are past due to the seller.

Docket No. EL01-10-000

On October 26, 2000, Puget Sound filed a complaint in Docket No. EL01-10-000 petitioning the Commission for an order capping the prices at which sellers subject to Commission jurisdiction, including sellers of energy and capacity under the Western Systems Power Pool Agreement, may sell energy or capacity in the Pacific Northwest's[19] wholesale power markets. Specifically, Puget Sound sought an order that prospectively capped the prices for wholesale sales of energy or capacity into the Pacific Northwest at a level equal to the lowest cap on prices established, ordered, or permitted by the Commission for wholesale purchases in, or wholesale sales of energy or capacity to or through the markets operated by the ISO or the PX. The December 15 Order declined to implement a region-wide price cap because it found that such a pricing methodology was impracticable given the market structure in the Pacific Northwest and because complainant had not met its burden of proof to justify

19. Puget Sound indicated that, as used in its complaint, the term "Pacific Northwest" has the meaning set forth in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839a(14) (1994).

such an action.[20] Puget Sound and others timely sought rehearing of the December 15 Order's determination not to impose a regional price cap or other mitigation.

On June 22, 2001, Puget Sound filed a motion to dismiss its complaint and a notice of withdrawal of its complaint and its subsequent rehearing request. Puget Sound explains that the June 19 Order satisfies its complaint because it implements price mitigation measures throughout WSCC. Several parties filed answers to the motion. Bonneville Power Administration (Bonneville) states that the Commission must fully resolve the issues raised in the complaint regardless of whether it grants Puget Sound's motion, arguing that the focus on spot markets in the June 19 Order is not appropriate outside of California, where utilities rely on forward contracts. The City of Tacoma and Port of Seattle jointly filed an answer opposing the motion on the basis that dismissal would unduly prejudice parties outside of California that relied on the existence of the complaint, and arguing that the issues raised in the complaint are an integral part of market issues that the Commission is addressing in the SDG&E proceeding.

The City of Seattle (Seattle) filed an answer and a motion to intervene out-of-time in Docket No. EL01-10-000. Seattle contends that, although the June 19 Order satisfied Puget Sound's complaint, the Commission should keep the proceeding open because non-California market participants have paid prices that are unjust and unreasonable, and because retaining the proceeding would permit the

20. December 15 Order, 93 FERC at 62,019.

Commission greater flexibility in determining the scope and effective date for refunds.

The Washington Commission and the Attorney General of Washington state several principles that they believe should guide the Commission's determination of whether and how to order refunds for and by the utilities in the Pacific Northwest, *i.e.*, that refunds should be symmetrical as to all purchases and sales, and unbiased with respect to acquisition strategies. In addition, the Attorney General of Washington moves to intervene out-of-time.

On June 22, 2001, unaware of Puget Sound's motion filed on the same day, the Commission issued an order clarifying the June 19 Order to indicate that parties in the settlement proceeding were not limited to settling only California-related matters, but could also discuss settling past accounts related to sales in the Pacific Northwest. The Chief Judge's Report stated that there was little time to address the issues raised by the parties in Puget Sound's proceeding and noted that they did not have data on unpaid balances nor on refunds due them.

Discussion

A. *Procedural Matters*

A number of entities filed late motions to intervene in this proceeding, as described below. On December 28, 2000, the Southern California Water Company (SoCal Water) filed

an intervention in Docket No. EL00-95-000, *et al.*[21] On January 30, 2001, the New Mexico Regulation Commission (New Mexico Commission) filed a motion to intervene out-of-time in Docket No. EL00-95-000, *et al.*, raising no substantive issues. On February 9, 2001, the Public Utilities Commission of Nevada (Nevada Commission) filed a motion to intervene out-of-time with comments encouraging recognition of the regional scope of the crisis. On April 9, 2001, the American Public Power Association (APPA) filed a motion to intervene and request for rehearing of the March 9 Refund Order. On July 12, 2001, the Washington Utilities and Transportation Commission (Washington Commission) filed a motion for clarification of its intervenor status, or, in the alternative, a motion to intervene out-of-time in Docket No. EL00-95-031, *et al.* Finally, on July 17, 2001, the People of the State of California, *ex rel.* Bill Lockyer (Attorney General of California) moved to intervene out-of-time in Docket No. EL00-95-031, *et al.*

In addition, on December 26, 2000, the Oregon Public Utilities Commission (Oregon Commission) filed a late motion to intervene in Docket No. EL00-10-000, stating that it had not yet developed a position on Puget Sound's complaint. On January 16, 2001, the Washington Commission also filed a late motion to intervene in that proceeding with comments in support of Puget Sound's request for rehearing. The City of Seattle (Seattle) and the Attorney General of Washington filed motions to intervene out-of-time in Docket No. EL01-10-000 on July 9, 2001.

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21. SoCal Water subsequently requested rehearing of the December 15 Order.

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The Commission ordinarily does not permit late interventions after an order has been issued, particularly for the purpose of requesting rehearing.[22] However, over the course of the SDG&E proceeding, the Commission has expanded the scope of its focus from just California to include the entire Western interconnect and also to implicate wholesale spot market transactions of non-public utilities. We find good cause, therefore, to grant the untimely, unopposed motions to intervene in Docket No. EL00-95-000 filed by the entities described above.[23]

These intervenors must accept the record as it had developed as of the date of their intervention, and their participation in this proceeding is limited to the issues that arose after the date each requested to participate in these proceedings. Thus, the request for rehearing of the December 15 Order filed by SoCal Water will be dismissed because it was not a party as of the date that order was issued. Similarly, APPA's request for rehearing of the March 9 Refund Order will be dismissed because it was not a party as of the date that order was issued.

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22. *See, e.g., Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000); *Consolidated Edison, Inc. and Northeast Utilities*, 92 FERC ¶ 61,014 (2000), *order denying reh'g*, 94 FERC ¶ 61,079 (2001).

23. In the May QF Order, we intended, but inadvertently failed, to grant the timely, unopposed motion to intervene of Carson Cogeneration Company, LP, Mojave Cogeneration Company, LP, O.L.S. Energy-Camarillo, O.L.S. Energy-Chino, and PE Berkeley, Inc. (collectively, QF Petitioners) filed in Docket No. EL00-98-000, and the untimely, unopposed motion to intervene of Berry Petroleum Company in Docket No. EL00-95-020. We do so in this order.

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In view of the interest of the Oregon Commission, the Washington Commission, the Attorney General of Washington, and Seattle, and the absence of any undue prejudice or delay, we will grant their untimely, unopposed motions to intervene. We also clarify that the companies listed individually in the caption of the March 9 Refund Order are respondents, and thus, under Rule 102 of the Commission's Rules of Practice and Procedure,[24] are parties in the SDG&E proceeding.

B. *Scope of Refunds*

* * *

2. *Refund Liability Should Apply to all Sellers of Energy in California*

The Commission has determined that all sellers of energy in the California ISO and PX spot markets should be subject to refund liability for the period beginning October 2, 2000.[53] We have decided to extend refund liability to public and non-public utility sellers based on our review of the controlling law, the involvement of both types of sellers in the California centralized ISO and PX spot markets, and the equities of the

53. While the Commission in other orders and in other contexts has stated that it does not have jurisdiction over non-public utilities under sections 205 and 206 of the FPA, we have re-examined our authority in the particular circumstances presented here: a centralized single clearing price auction that sets wholesale prices for both public utilities and non-public utilities, pursuant to market rules set by this Commission and administered by public utilities subject to this Commission's jurisdiction (the California ISO and PX).

situation. Non-public utility sellers as well as public utility sellers of electric energy in those California markets contributed to and benefitted from the dysfunctions that offered the possibilities for the market abuse under certain conditions, on which the call for refunds are based. In these circumstances, as discussed below, we conclude that although we do not have direct regulatory rate authority over power sales by non-public utilities, we do have authority to order them to abide by the market rules we have established and to make refunds of unjust and unreasonable rates for sales pursuant to those market rules. Accordingly, PG&E's, SoCal Edison's, and SDG&E's requests for rehearing of the March 9 Refund Order seeking refund liability for non-public utilities will be granted.

a. *Statutory Framework*

Analysis of the Commission's authority begins, as it must, with the FPA statutory language. The refund obligations at issue relate to the sale of electricity for resale in the California ISO's and PX's interstate spot markets. The Commission's authority, under FPA section 201(b), encompasses "the sale of electric energy at wholesale in interstate commerce." In the restructured California market, all sales into the PX or ISO meet this definition. *See also* FPA § 201(b)(2) (defining wholesale sales). The wholesale sales of electricity here thus fall within the subject matter of the Commission's statutory authority.

The question at issue involves the interplay between that subject matter jurisdiction and the express limitations on FPA jurisdiction to public utilities. The Commission's authority

under FPA section 206(a) is limited to rates "collected by any public utility for any . . . sale subject to the jurisdiction of the Commission." FPA section 201(d)(2)(f) provides that, except where specifically stated otherwise, no provision of Part II of the FPA applies to "the United States, a state or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing").

b. *FERC Has Jurisdiction Over the Subject Matter of The Sales At Issue*

At issue is whether the Commission can assert jurisdiction over the California ISO and PX wholesale electricity markets in a manner that encompasses non-public utility sellers that are not subject to our direct jurisdiction under FPA section 206. Under the specific circumstances presented, we conclude that such jurisdiction may properly be asserted over non-public utility sellers of energy. Under the single price auction mechanism that operated in the centralized ISO and PX spot markets, all sellers agreed to accept the same clearing price for any given sale. From the time the Commission acted on SDG&E's complaint, all sellers into those markets were on notice that those clearing prices , and the market rules that set the clearing prices, were subject to change if they were found to be unjust and unreasonable. For example, the November 1 Order states: ". . . if the Commission finds that the wholesale markets in California are unable to produce competitive, just and reasonable prices . . . we may require refunds for sales made during the refund effective period."[54]

54. 93 FERC at 61,370; *see also* December 15 Order, 94 FERC at 62,010-11 (same).

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Our action here establishes a revised method for calculating the just and reasonable clearing prices to be applied in those markets for the period beginning October 2, 2000. This is pursuant to the Commission's authority under FPA section 206 to fix the just and reasonable rate. Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales. In this context, we see no reason to treat non-public utility sellers differently, as they are receiving the same price, the just and reasonable market clearing price established pursuant to market rules approved by this Commission, that they expected to obtain for their wholesale sales into the centralized ISO and PX spot markets.

When faced with a similar question under the Natural Gas Act, the D.C. Circuit concluded that the Commission could exert rate authority over non-jurisdictional entities to fulfill its statutory responsibilities regarding the subject matter of its NGA jurisdiction. In *United Gas Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), local distribution companies and municipalities, both of whom are exempt from NGA jurisdiction, challenged application of FERC's open access rules to their release of their own capacity on a pipeline system. The court focused on the subject matter of the transaction, not the parties involved, to determine the Commission's authority to act. The court found that, notwithstanding the LDCs' exemption from the NGA, "the Commission's jurisdiction attaches to the subject of the capacity release transaction: interstate transportation rights." 88 F.3d at 1152. Further, the court found that exempting LDCs would allow them to engage in capacity release "without regard to the principles of open access and

nondiscrimination that are at the heart" of the program. *Id.* That result would be "directly contrary to Congress' intent in enacting the [NGA]." *Id.* Consequently, the court found the Commission properly included LDCs within the regulatory plan to further the statutory goals.

Similarly, here, Commission jurisdiction attaches to the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including non-public utilities. Exempting transactions involving non-public utility sellers from refund scrutiny here would allow them to make such sales without regard to the just and reasonable standard that applies to the market clearing price administered by the ISO (and previously by the PX), and that pervades all Commission ratemaking policies.

It is noteworthy that California may not regulate out of state sellers and has declined to regulate California non-public utilities' sales in the California centralized ISO and PX spot markets. As a result, absent FERC jurisdiction, a regulatory gap for these sales could exist. Such a result could preclude us from protecting consumers from exploitation in these markets, one of our statutory objectives under the FPA.

For essentially the same reasons, the court in *UDC* found the Commission could require compliance with its capacity release regulations from municipalities.

> FERC may, consistent with the NGA, require municipalities to comply with its capacity release regulations .... FERC's transportation jurisdiction extends as a separate matter over capacity release given the involvement of interstate gas *pipelines*. The pipelines' role in capacity release is absolutely central, and the transaction itself controls access to interstate transportation capacity, entirely independent of the jurisdictional nature of the releasing and replacement shippers.

88 F.3d at 1154 (emphasis in original; footnotes omitted). The court also found "compelling" that prior to adoption of the Commission's capacity release program, neither jurisdictional nor non-jurisdictional entities could release capacity. Thus, as the Commission set up the program that benefitted both jurisdictional and non-jurisdictional parties, it could establish rules by which *all* parties must abide. *Id.*

Here, the central transactions, wholesale sales of energy in interstate commerce, were governed by FERC-approved rules and a FERC-jurisdictional ISO and PX. Those transactions thus fell within FERC's jurisdiction regardless of the jurisdictional nature of the sellers or buyers. Further, the centralized wholesale spot electricity markets operated by the California ISO and PX were established (and have been modified) subject to FERC review and approval. Because the market did not exist prior to FERC authorization, all those who participated in the market had to recognize the controlling weight of FERC authority. Moreover, it is fair that all those who benefitted from this market also bear

responsibility for remedying any potential unlawful transactions that might have occurred in the market.

Non-public utility sellers in the California market entered into various arrangements that acknowledged the Commission's authority over the centralized transactions. For example, in *Pacific Gas and Electric Co., et al.*, 82 FERC ¶ 61,326 (1998), many non-public utility sellers accepted a FERC-authorized, *pro-forma* Scheduling Coordinator Agreement. *Id.* at 62,283.[55] Among the obligations under the Agreement, parties agreed "to comply with the terms and conditions of the ISO Tariff and ISO Protocols." *Id.* For the PX, the Commission required that parties sign a FERC-authorized, *pro-forma* Participation Agreement. *California Power Exchange Corp.*, 83 FERC ¶ 61,186 (1998). Against opposition, the Commission concluded that the Participation Agreement and "the services provided under the PX Tariff are jurisdictional." *Id.* at 61,771. The Commission indicated that the Agreement "is the contract under which the California PX provides these services to its customers" and, as such, could be required to be filed in accordance with FPA section 205(c). *Id.* A large number of non-public utility sellers executed the Participation Agreement. *See, e.g.*, PX letter filing of January 25, 2001 (index of parties who executed the Agreement as of December 31, 2000).

Placing jurisdictional and non-jurisdictional sellers on the same footing for refund purposes promotes the underlying goals of the FPA. Under California's restructuring system,

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55. One such seller was City of Los Angeles, Department of Water & Power, whose Agreement was docketed as ER98-1934-000. *Id.*

interstate, wholesale sales of electric energy were transacted largely through hourly single price auctions, which meant that all bidders into these spot markets received the same price for a specific sale. In fact, prior to Commission modification, California public utilities were required by California to transact exclusively through the PX under the mandatory buy/sell rule.

Consequently, if the price for a specific sale is found to be unjust and unreasonable, then all sellers who obtained that price received an unjust and unreasonable rate. To the extent the Commission determines refunds are an appropriate remedy for that sale, consumers can only be made whole by refunds from all sellers who received the excessive price.[56] As non-public utility sellers of energy and ancillary services accounted for up to 30 percent of all sales in the California centralized ISO and PX spot markets, excluding them from a potential refund remedy could have a serious detrimental effect on consumers.

3. *Refund Liability Can Apply From October 2, 2000 Through June 20, 2001*

The above discussion also largely disposes of any claim that the Commission is impermissibly applying refund

56. We note that non-public utilities (*e.g.*, Turlock Irrigation District and the City of Burbank) are seeking refunds for what they perceive are excessive charges paid in these markets. Under the maxim that those who seek equity must do equity, *McQuiddy v. Ware*, 87 U.S. 14,19 (1873); *In re Gardenshire*, 209 F.3d 1145, 1152 n. 11 (9th Cir. 2000), it would only be fair that these same utilities be willing to pay refunds related to any excessive amounts they may have collected.

liability to non-public utility sellers back to the October 2, 2000, refund effective date that we previously announced. Because refund obligations relate to factual issues concerning past periods, their resolution is considered to be adjudication. Adjudications are generally given retroactive effect. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94-95 (1993) (referring to "the fundamental rule of retrospective operation that has governed judicial decisions for near a thousand years"). The Court has declined to accept equitable reliance as grounds for limiting the retroactive application of an adjudicatory decision. "The federal law applicable to a particular case does not turn on whether litigants actually relied on an old rule [or] how they would suffer from retroactive application of a new one." *Id.* at n.9 (citation and quotation marks omitted).

Of course, in the instant matter, as explained above, the non-public utility sellers were well aware that these transactions involved wholesale sales of electricity subject to FERC jurisdiction. These sellers had executed the *pro forma* agreements established by the Commission that indicated, in part, their willingness to comply with the terms of the FERC-jurisdictional ISO or PX tariffs. These factors undermine possible claims that non-public utility sellers of energy could reasonably have relied on their sales for resale of electricity into the centralized interstate California ISO and PX spot markets not properly being subject to FERC jurisdiction.

The Supreme Court's discussion of retroactivity arose in the context of judicial adjudication, but the same principles counsel strongly for like treatment in agency adjudications.

See Southwestern Public Service Co. v. FERC, 952 F.2d 555, 563 (D.C. Cir. 1992) (indicating FERC "should take note" of recent Supreme Court case that "may forbid agencies to apply rules with selective retrospectivity.") (citation omitted). The D.C. Circuit also recently indicated that selective retroactivity[57] for remedial purposes "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1781, 1789 (D.C. Cir. 1995) (citation omitted). Here, as discussed above, public utility and non-public utility sellers under the single price auction system used in the affected markets were similarly situated regarding the price they received for their sales for resale of electricity, and thus should be treated similarly in the consideration of whether refunds should be required.

The D.C. Circuit has, however, expressly declined to require that agency adjudications enforcing agency decisions apply retroactively. *See, e.g., Power Corp. of America*, 245 F.3d at 847. Instead, the court applies a five-part test for deciding if retroactivity is inappropriate. *Williams Natural Gas Co. v. FERC*, 3F.3d 1544, 1553-55 (D.C. Cir. 1993); see *Retail Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)(one formulation of criteria). Under these criteria, our determination that non-public utility sellers of energy in the California market can be liable for refunds should apply retroactively.

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57. That is, prospective application for some, and retrospective application for others.

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The initial criterion asks whether the issue is one of first impression. We have no trouble finding that the instant question is, given that California was the first state to restructure its electricity market and the Commission had never dealt with market-wide refunds in a single price auction for widespread centralized spot purchases of wholesale electricity in interstate commerce. The next criterion looks to whether Commission action seeks to fill a void in an unsettled area of the law. For the same reasons mentioned in the first criterion, this factor weighs in favor of retroactivity. The Commission seeks to redress a previously unencountered situation in a manner that furthers the underlying purpose of the FPA.

The third criterion asks the extent to which parties relied on the old rule. Here, there was no old rule to apply to the precise situation. But, in any event, non-public utility sellers should have recognized their sales for resale into the centralized ISO or PX spot markets were the subject of FERC jurisdiction and scrutiny. Among other things, FERC's investigation into the ISO and PX market practices and rules, with indications in the August 23 Order that possible remedies included changes to the market clearing price mechanisms and refunds, should have alerted non-public utility (as well as public utility) sellers of FERC's authority over their sales in those markets. Moreover, those sellers signed FERC pro forma agreements that indicated their willingness to comply with FERC-authorized tariffs.

The fourth and fifth criteria also weigh in favor of retroactivity. Ordering non-public utility sellers to refund amounts received in excess of just and reasonable rates does

not impose an unfair burden, but merely place those sellers in the same position as public utility sellers. Finally, the statutory interest in protecting consumers against exploitation is furthered by subjecting non-public utility sellers, who represent up to 30 percent of all sales into the California ISO and PX spot markets during the applicable time period, to possible refund liability to the sar e extent as public utility sellers. Otherwise, consumers will not be made whole for any prices found to be excessive. Moreover, fundamental fairness dictates that in the context of a single price auction, where all bidders received the same price for a specific sale, all those parties should now bear the responsibility of refunding any amounts found to be unjust and unreasonable.

In short, the balance tips decidedly in favor of retroactive application of refund liability to October 2, 2000, for all sellers in the California ISO and PX spot markets.

* * *

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket Nos. EL00-95-031 and EL00-98-030 concerning refund amounts, as discussed in the body of this order.

(B) Administrative Law Judge Birchman shall convene a conference in this proceeding, to be held as soon as practicable after the date of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The ISO is hereby directed to provide Judge Birchman with data, as discussed in the body of this order. Judge Birchman is hereby directed to certify the record and findings of fact to the Commission no later than 45 days after such data is provided.

(D) The parties to the proceeding in Docket No. EL01-10-000 are hereby directed to participate in discussions before an Administrative Law Judge, to be designated by the Chief Administrative Law Judge, as discussed in the body of this order.

(E) No later than 7 days after the completion of discussions in Docket No. EL01-10-000, the designated judge shall make a recommendation to the Commission.

(F) Requests for rehearing of the November 1 Order regarding the Commission's retroactive refund authority (*i.e.*, refund authority prior to October 2, 2000) are hereby denied.

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(G) Requests for rehearing of the March 9 Refund Order regarding the Commission's authority to require refunds from non-public utilities and regarding the application of price mitigation during all hours are hereby granted.

(H) The Oversight Board's March 1 motion is hereby denied.

(I) The request for rehearing of the December 15 Order filed by Southern California Water Company is hereby dismissed.

(J) The request for rehearing of the March 9 Order filed by American Public Power Association is hereby dismissed. By the Commission. Commissioner Massey dissented in part and concurred in part with a separate statement attached.

Commissioners Breathitt and Massey jointly dissented in part with a separate statement attached.

Commissioner Breathitt dissented in part with a separate statement attached.

* * *

Linda K. Breathitt and William L. Massey Commissioners, *dissenting in part*:

We respectfully disagree with the conclusion reached in this order to extend a potential refund obligation to sellers into the California spot markets that are not jurisdictional public utilities. The majority concludes that while "we do

not have direct regulatory authority over power sales by non-public utilities, we do have authority to order them to abide by the market rules we establish to make refunds of unjust and unreasonable rates for sales pursuant to those market rules."

Although this rationale certainly has strong appeal, especially as a matter of equity, we are not sufficiently comfortable with it. The refund rules of section 206 of the Federal Power Act are rather specific. If Congress had wanted the Commission to have refund authority over non-public utilities, Congress would have surely so specified. The breathtaking conclusion that this agency has the power to tell non-public utilities to pay money back will come as a shock to most observers.

We understand and appreciate the strong equity rationale behind the majority's decision. Perhaps this interpretation of the Commission's refund authority ought to be the law, but we are not yet persuaded that it is allowed by existing law. Unfortunately, the majority's conclusion ensures that the matter of refunds will probably never be settled and will be litigated for years.

For these reasons, we dissent in part from today's order.

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Linda K. Breathitt, Commissioner, *dissenting in part*:

I respectfully disagree with the majority's inclusion of a ten percent creditworthiness adder in the methodology to determine refund liability. The rationale stated in this order, that sellers cannot be assured that buyers will pay the full refunds due, is not persuasive in my opinion.

I was concerned about the creditworthiness adder included on a prospective basis through the market clearing price methodology established in our June 19, 2001 order. There I concurred on this issue. Today I will dissent on this issue because I see even less reason for such an adder to be included on a retroactive basis through the refund methodology.

* * * *

APPENDIX D — ORDER ON CLARIFICATION AND REHEARING ISSUED DECEMBER 19, 2001

FEDERAL ENERGY REGULATORY COMMISSION

97 FERC ¶ 61,275 (2001)

San Diego Gas & Electric Company, Complainant v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

Investigation of Practices of the California Independent System Operator and the California Power Exchange

Public Meeting in San Diego, California

Reliant Energy Power Generation, Inc., Dynegy Power Marketing, Inc., and Southern Energy California, L.L.C., Complainants v. California Independent System Operator Corporation, Respondent

California Electricity Oversight Board, Complainant v. All Sellers of Energy and Ancillary Services Into the Energy and Ancillary Services Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

California Municipal Utilities Association, Complainant v. All Jurisdictional Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

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CAlifornians for Renewable Energy, Inc. (CARE), Complainant v. Independent Energy Producers, Inc., and All Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange; All Scheduling Coordinators Acting on Behalf of the Above Sellers; California Independent System Operator Corporation; and California Power Exchange Corporation, Respondents

Puget Sound Energy, Inc., Complainant, v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, Respondents

California Independent System Operator Corporation

California Independent System Operator Corporation Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council

California Power Exchange Corporation

California Independent System Operator Corporation

California Independent System Operator Corporation

Southern California Edison Company and Pacific Gas and Electric Company

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Arizona Public Service Company

Automated Power Exchange, Inc.

Avista Energy, Inc.

California Power Exchange Corporation

Duke Energy Trading and Marketing, LLC

Dynegy Power Marketing, Inc.

Nevada Power Company

Portland General Electric Company

Public Service Company of Colorado

Reliant Energy Services, Inc.

Sempra Energy Trading Corporation

Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC

Williams Energy Services Corporation

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Docket Nos. EL00-95-001, EL00-95-004, EL00-95-005, EL00-95-006, EL00-95-007, EL00-95-010, EL00-95-011, EL00-95-019, EL00-95-039, EL00-95-046, EL00-95-047

Docket Nos. EL00-98-001, EL00-98-004, EL00-98-005, EL00-98-006, EL00-98-008, EL00-98-010, EL00-98-011, EL00-98-018, EL00-98-037, EL00-98-043, EL00-98-044

Docket No. EL00-107-002

Docket No. EL00-97-001

Docket No. EL00-104-001

Docket No. EL01-1-001

Docket No. EL01-2-001

Docket No. EL01-10-001

Docket Nos. ER01-607-000, ER01-607-001

Docket Nos. RT01-85-002, RT01-85-005

Docket Nos. EL01-68-002, EL01-68-008

Docket No. ER00-3461-001

Docket No. ER00-3673-001

Docket No. ER01-1579-001

Docket Nos. EL01-34-000, EL01-34-001

Docket Nos. ER01-1444-001

Docket Nos. ER01-1445-001

Docket Nos. ER01-1446-001

Docket Nos. ER01-1447-001

Docket Nos. ER01-1448-002

Docket Nos. ER01-1449-002

Docket Nos. ER01-1450-001

Docket Nos. ER01-1451-002

Docket Nos. ER01-1452-001

Docket Nos. ER01-1453-001

Docket Nos. ER01-1454-002

Docket Nos. ER01-1455-002

Docket Nos. ER01-1456-002

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ORDER ON CLARIFICATION AND REHEARING

(Issued December 19, 2001)

Before Commissioners: Pat Wood, III, Chairman, William L. Massey, Linda Breathitt, and Nora Mead Brownell.

Introduction and Summary

In this order the Commission acts on petitions for rehearing of four interrelated orders issued in the above dockets to address mitigation of prices for power sold at wholesale through centralized, single price auction spot markets operated by the California Independent System Operator Corporation (ISO) and California Power Exchange Corporation (PX), as well as mitigation of prices for power sold at wholesale in bilateral (contractual) markets in the Western System Coordinating Council (WSCC). Since August 2000, the Commission has issued a series of orders (nearly 75), including the four orders addressed herein, dealing with various aspects of the recent electricity crisis in California. These orders have been aimed at correcting the market dysfunctions which contributed to the California crisis and which are within our jurisdiction to correct, and at stabilizing prices until the necessary corrections — including correction of the supply-demand imbalance in California — can be made. The four interrelated orders addressed herein, issued December 15, 2000, March 9, 2001, June 19, 2001, and July 25, 2001, represent the major steps taken by the Commission to modify the ISO market rules and adjust the pricing mechanisms used in California and the West, to ensure just and reasonable rates in Western markets.[1]

1. In addition, this order acts on petitions for rehearing and/or clarification of four related orders issued on August 23, 2000, November 1, 2000, and two on December 8, 2000.

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In exercising our responsibility under the Federal Power Act to ensure just and reasonable rates for wholesale sales of electric energy, the Commission has been faced with a very complex set of state and federal market rules affecting the California energy markets as well as a set of rapidly changing market conditions over the past year. The Commission has adopted a measured approach to provide for market corrections and price mitigation, attempting to balance the need to protect customers from high prices in the short-term with the need to ensure that power continues to flow and that incentives are provided to bring much needed power supply on-line for the longer term. While some have argued in these proceedings that the Commission has failed to fulfill its statutory obligations by not returning to a system of cost-of-service rates, we conclude that such action was, and is, neither necessary nor appropriate to protect customers in either the short or the long-term, and that such action would deprive customers of the benefits that a competitive market will yield once the market dysfunctions are fully corrected and sufficient new supply is brought to fruition. Accordingly, today's order denies the petitions for rehearing on this fundamental issue and, on other issues, grants limited rehearing or clarification to ensure that the rate corrections ordered by the Commission yield just and reasonable rates.

Procedurally, the Commission's actions separate into two general time frames. The first is the period from October 2, 2000 until June 20, 2001 (with a minor exception).[2] For this time frame, the issue is whether refunds are owed by any sellers in the organized spot markets in California and, if so, how much. This issue is guided primarily by an order issued

2. *See infra*, n.163.

by the Commission on July 25, 2001.[3] There, the Commission prescribed a formula for determining the amount of any refunds and instituted evidentiary procedures before an administrative law judge to make findings of fact applying the formula. The formula is based substantially on the approach adopted for mitigation prospectively, described below. The Commission recently deferred temporarily the evidentiary procedures before the administrative law judge. In today's order, we direct the resumption of those procedures. When those procedures are completed, the administrative law judge will certify findings of fact for the Commission's consideration.

The second time frame is from June 21, 2001 until September 30, 2002 (with the same minor exception). For this time frame, the Commission adopted a prospective market monitoring and mitigation program to ensure that rates for spot sales throughout the Western United States remain just and reasonable. This program was prescribed in Commission orders issued on April 26 and June 19, 2001.[4]

Elements of the plan previously adopted include:

• Enhancing the ability of the California Independent System Operator (ISO) to coordinate and control planned outages during all hours.

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3. *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 (2001), *reh'g pending on some issues* (July 25 Order).

4. *San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,115 (April 26 Order), *order on reh'g*, 95 FERC ¶ 61,418 (2001) (June 19 Order).

• Requiring sellers, including governmental entity[5] generators that voluntarily make sales into FERC-regulated markets or use FERC-regulated interstate transmission facilities (with the exception of hydroelectric power), to offer all their available power in real time during all hours.

• Establishing conditions, including refund liability, on public utility sellers' market-based rate authority to prevent anticompetitive bidding behavior in the real-time market during all hours.

• Establishing a mechanism for price mitigation for all sellers bidding into the ISO's real-time market during a reserve deficiency, i.e., when reserves in California fall below 7 percent. Under this mechanism, the Commission established a formula (based on gas-fired generation) that the ISO can use to establish the market clearing price when mitigation applies (mitigated reserve deficiency MCP).[6] Higher bids were permitted if they could be justified.

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5. Our prior discussions regarding governmental entities imprecisely labeled them "non-public utilities." Use of that term is somewhat misleading, as many governmental entities fit within the definition of a "public utility." See FPA sections 201(e) and 3(7). Accordingly, our discussions regarding governmental entities will use the term "governmental entities" rather than "non-public utilities."

6. The mitigated reserve deficiency MCP is the marginal cost of the last unit dispatched to serve the last increment of load during a period of reserve deficiency. The marginal cost of each unit calculated by the ISO based on Commission prescribed inputs is referred to as the "Proxy Price."

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• Applying that clearing price as a maximum price for sales outside the ISO's single price auctions (bilateral sales in California and the rest of the WSCC), with sellers outside the single price auction receiving the prices they negotiate up to this maximum price.

• Using eighty-five percent of the highest ISO hourly mitigated reserve deficiency MCP established during the hours of the last Stage 1 alert for the mitigated non-reserve deficiency Market Clearing Price (mitigated non-reserve deficiency MCP) for subsequent non-reserve deficiency hours.

• Instructing bidders to invoice the ISO directly for the cost to comply with emissions requirements and for start-up fuel costs, which are too varied to be standardized in a single market clearing price.

• Allowing sellers other than marketers the opportunity to justify bids or prices above the maximum prices.

In today's order, we make only minor changes to this approach. For example, we now exclude governmental entities and cooperatives from price mitigation with respect to bilateral transactions outside of the ISO spot market, and with respect to the must-offer requirement outside of California. We also eliminate an "underscheduling" penalty imposed earlier. We state that marketers, load serving entities and hydroelectric generators may submit evidence that the refund method results in a total revenue shortfall in the organized California spot markets for their transactions during the refund period, after the conclusion of the refund

hearing. These and other changes adopted today are described fully below. In all other respects, we affirm the approach adopted previously. In addition, we require the ISO to file a revised congestion management plan and a plan for the creation of a day-ahead energy market in California, both of which are to be filed by May 1, 2002.

Background

In May 2000, the costs of electric energy in California's wholesale market began to rise and the Commission instituted a nationwide investigation in July and an investigation on California matters in August. On November 1, 2000, the Commission released for public comment its staff's report on the reasons for the price increase. For the last year, the Commission has worked to correct the market dysfunction, and possible exercise of market power, that it believes are the cause of the price increases. As explained below, we have mitigated prices to ensure they are no higher than those that would result in a competitive market, i.e., at a price no higher than the cost of the least efficient generating unit needed to meet load, for the period October 2, 2000 through September 30, 2002, when we predict conditions to be adequate to revert to pricing based on market prices without regulatory price intervention.

We have used our experience and expertise to fashion, and modify as appropriate, our remedy to ensure that rates are just and reasonable under the limitations which Congress has enacted. While the past 18 months have caused many to question the wisdom of setting rates based on market forces, we continue to believe that market forces can ensure that

wholesale rates remain just and reasonable, with proper regulatory oversight. The experience in the natural gas industry continues to convince us that our initial and subsequent decisions to authorize market-based rates in situations in which sellers lack market power is appropriate and in the long-term interests of customers.

We have recently taken steps to ensure that sellers lack market power, or cannot benefit from any market power they may temporarily possess. Besides the West-wide temporary price mitigation we have ordered and confirm today, as modified, we are in the process of: (1) completing the work of separating operation of transmission and generating facilities; (2) ensuring that sellers with market-based rates cannot benefit from engaging in anticompetitive behavior; and (3) standardizing wholesale market rules. We believe these steps will ensure that wholesale rates for the sale of electric energy in interstate commerce remain just and reasonable under the changing conditions we confront in the electric utility industry.

A. *August 23 Order*

On August 2, 2000, in response to significant increases in prices for energy and Ancillary Services in California, San Diego Gas & Electric Company (SDG&E) filed a complaint in Docket No. EL00-95-000. This complaint, filed against all sellers of energy and Ancillary Services into the ISO and PX markets subject to the Commission's jurisdiction, requested that the Commission impose a $250 price cap for sales into those markets. The Commission denied this request in an order issued August 23, 2000, on the grounds that

SDG&E had not provided sufficient evidence to support an immediate seller's price cap.[7] However, in that order, the Commission instituted formal hearing procedures under section 206 of the Federal Power Act (FPA) to investigate the justness and reasonableness of the rates of public utility sellers into the ISO and PX markets, and also to investigate whether the tariffs, contracts, institutional structures and bylaws of the ISO and PX were adversely affecting the wholesale power markets in California. The Commission established a refund effective date of 60 days after publication of notice in the Federal Register of the Commission's intent to institute a proceeding.[8]

In the order, the Commission also directed the ISO to immediately institute a more forward approach to procuring its resources. In response, the ISO filed on September 1, 2000 proposed Tariff Amendment No. 30 to provide it with the authority to forward contract.

Southern California Edison Company (SoCal Edison) and Pacific Gas and Electric Company (PG&E) sought rehearing of the August 23 Order arguing that the Commission should have established an earlier refund effective date, October 2, 2000, which was 60 days following SDG&E's complaint filing. The utilities also sought immediate action by the Commission on the complaint, and argued for refunds prior to the refund effective date. Dynegy Power Marketing, Inc., El Segundo Power, LLC, Long Beach

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7. *San Diego Gas & Electric Company, et al.*, 92 FERC ¶ 61,172 at 61,606 (2000) (August 23 Order).

8. *Id.* at 61,608.

Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC (Dynegy) and Duke Energy North America LLC, Duke Energy Trading and Marketing, LLC, and Duke Energy Merchants, LLC (Duke) filed answers to the rehearing requests.

B. *November 1 Order*

The Commission issued an order on November 1, 2000 proposing measures to remedy problems identified in the ISO and PX markets.[9] In the November 1 Order, the Commission proposed remedies intended to reduce over-reliance on spot markets in California, and attempted "to balance, on the one hand, holding overall rates to levels that approximate competitive market levels for the benefit of consumers, with, on the other hand, inducing sufficient investment in capacity to ensure adequate service for the benefit of consumers."[10] The order proposed, effective 60 days after the date of the order, to: (1) eliminate the requirement that the investor-owned utilities (IOUs) must buy and sell power through the PX, (2) require market participants to schedule 95 percent of their transactions in the Day-Ahead markets or be subjected to a penalty charge; (3) replace the existing PX and ISO stakeholder boards with independent non-stakeholder boards; and (4) require the filing of generator interconnection procedures.

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9. *San Diego Gas & Electric Company, et al.*, 93 FERC ¶ 61,121 (2000) (November 1 Order).

10. *Id.*

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The order also identified longer-term structural reforms of ISO and PX markets that must be addressed, and urged state officials to take certain actions within their exclusive jurisdiction. Also, to ensure reasonable prices while various market reforms were being put in place, the order proposed additional temporary measures to mitigate prices, including modification of the single price auction so that bids above $150/MWh could not set the market clearing price that is paid to all bidders and imposition of certain reporting and monitoring requirements for transactions and bids above the $150/MWh breakpoint, as well as the retention of a refund obligation for sales into the ISO and PX markets for the period October 2, 2000 through December 31, 2002. The Commission explained that a paper hearing would be adequate to resolve the matters before it, established a period for the submission of comments and supporting evidence, and announced its intent to issue a final order adopting and directing remedies for California's markets before the end of the calendar year.

The November 1 Order granted rehearing in part of the August 23 order by changing the refund effective date from 60 days after publication of notice in the Federal Register (October 29, 2000) to 60 days after the date of SDG&E's complaint (October 2, 2000). Finally, the Commission rejected proposed tariff amendments filed by the PX and the ISO in Docket Nos. ER00-3461-000 and ER00-3673-000, respectively, requesting or extending price caps for their markets.

Numerous parties sought rehearing of the November 1 Order, primarily objecting to certain proposed remedies or

the proposed timing of their implementation, or the lack of other measures that were not included in the order. Parties also raised arguments about procedural aspects of the November 1 Order, including that the Commission should exercise its discretion to order refunds for periods prior to October 2, 2000, and requested various clarifications. The California Commission and the Oversight Board objected to the rejection of the ISO and PX price cap proposals.

C. *Amendment No. 33 Order (December 8, 2000)*

Beginning in mid-November, the ISO experienced numerous occasions of insufficient reserve margins and emergency conditions forcing it to serve increasingly large portions of its total Control Area load through its real-time Imbalance Energy market. On December 8, 2000, the Commission accepted for filing Amendment No. 33 to the ISO Tariff, which the ISO had submitted earlier that same day in Docket No. ER01-607-000.[11] Amendment No. 33 made three changes to the ISO Tariff. First, the existing $250/MWh purchase price cap on bids in the ISO's real-time Imbalance Energy Market was converted into a $250/MWh breakpoint, similar to the one described in the November 1 Order. Second, generators who failed to comply with an ISO emergency dispatch order became subject to a penalty. Third, a Scheduling Coordinator with unscheduled demand or undelivered generation became liable for the cost the ISO incurred to obtain electricity through bids above the $250/MWh breakpoint or through out-of-market dispatches.

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11. *California Independent System Operator Corporation*, 93 FERC ¶ 61,239 (2000) (Amendment No. 33 Order).

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After issuance of the Amendment No. 33 Order, numerous entities filed motions to intervene along with various requests for clarification, modification, or rehearing; entities seeking intervention are listed in Appendix B. Several parties complain that the Commission violated due process by not affording the public any notice or opportunity to comment on Amendment No. 33. With regard to the $250/MWh breakpoint, the California Commission, PG&E, and SDG&E state that the Commission should not have allowed the ISO to remove the purchase cap. PG&E argues that the $250/MWh breakpoint was too high; Dynegy argues that it was too low. Several parties state that the $250/MWh breakpoint in the ISO market had unintended consequences in the PX markets. Dynegy states that it is unfair to impose penalties on generators who fail to respond to ISO emergency dispatch orders and offers several arguments to support that statement. With regard to the assessment of costs for unscheduled load and undelivered generation, PG&E claims that assessing costs for underscheduled demand will give sellers unfair leverage. Dynegy argues that the ISO has failed to offer adequate justification for assessing costs for undelivered generation.

D. *Qualifying Facilities (QF) Order (December 8, 2000)*

Also on December 8, 2000, the Commission issued an order waiving certain efficiency and fuel use regulations pertaining to QFs, effective for the period December 8 through December 31, 2000.[12] The waiver allowed certain QFs to sell their excess production to load located in

12. *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,238 (2000) (December QF Order).

California through negotiated bilateral contracts to supplement the inadequate generation resources in California.

SoCal Edison filed a request for immediate modification of the order, claiming that permitting sales of excess production interfered with existing contractual relationships, created uncertainty between the parties, and was unworkable given the short time period for the waiver (less than a month). SoCal Edison requests that the Commission limit its order to waiving efficiency and fuel use standards, and that the Commission allow the parties to determine how the waiver would impact their contractual rights and obligations, including whether a contract amendment should be negotiated.

E. *December 15 Order*

The Commission adopted many of the proposed remedies presented in the November 1 Order in an order issued December 15, 2000.[13] The December 15 Order focused on the need to reduce reliance on spot markets while balancing the need for incentives for sellers to sell into California and for investment in generation and transmission facilities, with the overall goal of alleviating the extreme high prices being borne by Californians. The specific remedial measures adopted included: (1) eliminating the requirement that the IOUs sell all of their generation into and buy all their energy needs from the PX so as to terminate the over reliance on

13. *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000), *reh'g pending on some issues* (December 15 Order).

spot markets (which in turn required termination of the PX's wholesale rate schedules, as of the close of the April 30, 2001 trading day); (2) adopting an advisory benchmark for assessing prices of long-term electric supply contracts in order to provide guidance for market participants to evaluate the reasonableness of long-term prices; (3) requiring market participants to preschedule 95 percent of their load prior to real time and penalizing those who do not, so as to eliminate market participants' chronic underscheduling with the ISO; (4) establishing an interim modification of the single price auction as proposed in the November 1 Order and reporting requirements for transactions and/or bids over $150/MWh; and (5) requiring the ISO stakeholder governing board to resign and be replaced by a board independent of market participants. The order provided that, unless the Commission issued written notification to a seller that a transaction above the $150 breakpoint was still under review, refund potential on that transaction would close after 60 days.

Other actions taken in the order included: (1) extending the waiver of certain QF regulations granted in the December QF Order through April 30, 2001; (2) accepting for filing the ISO's tariff Amendment No. 30 (Docket Nos. EL00-95-002 and EL00-98-002); (3) rejecting the complaints filed in Docket Nos. EL00-97-000, EL00-104-000, EL01-1-000, EL01-2-000, and EL01-10-000; and (4) requiring the ISO, PX and IOUs to submit compliance filings.

SoCal Edison and PG&E filed emergency requests for rehearing on December 18 and 20, 2000, respectively. The companies detailed their weakening financial situations. According to SoCal Edison, between May and November

2000, it paid a total of $5.69 billion for wholesale electricity but collected billions less from its customers. Unless the California Commission ended its retail rate freeze, allowing recovery of wholesale costs in retail rates, and this Commission ordered a return to cost-based rates, SoCal Edison explained, it would not be able to meet its January financial obligations. The companies also warned that without immediate relief on their rehearing requests, they would seek action in federal courts.[14]

The PX filed a request for rehearing and emergency motion for stay of the December 15 Order on December 26, 2000. The PX requested that the Commission stay three aspects of the order: (1) the prohibition against the IOUs selling into the PX's spot markets and forward markets, allowing instead voluntary participation; (2) the termination of its block forward markets rate schedule; and (3) implementation of the $150/MWh breakpoint, which the PX stated was impossible to accomplish by January 1, 2001. The PX also sought rehearing of these aspects of the order, and in addition challenged the termination of its tariff governing its core markets. The PX cited the chilling effect of the December 15 Order on forward contracts calling for delivery after April 30, 2001, and stated that the order threatened to destroy it.[15]

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14. SoCal Edison later filed a petition for writ of mandamus. The D.C. Circuit denied the petition. *In re: Southern California Edison Co.*, No. 00-1543 (D.C. Circuit filed January 5, 2001).

15. The PX later filed a petition for writ of mandamus, which the Ninth Circuit denied. *In re: California Power Exchange Corp.*, No. 01-70031 (9th Cir. filed April 11, 2001).

Many other parties subsequently filed rehearing requests. Generally, generators and marketers argue that the Commission erred in finding rates were not just and reasonable during certain periods, that the Commission should eliminate or modify the $150/MWH breakpoint, and that the Commission erred in determining that opportunity costs could not be used to justify bids over the breakpoint. Others (e.g., municipals, IOUs, state government entities) ask for reconsideration of cost-based regulation and favor regional price mitigation, offering various proposals on how to implement both of these goals, and urge prompt determination of past overcharges and provision of refunds. Rehearing is sought in each of the related complaint dockets that were rejected, and regarding ISO Tariff Amendment Nos. 30 and 33.

F. *Proceedings Concerning the Underscheduling Penalty*

In the December 15 Order, the Commission adopted a penalty for any utility that underscheduled its load. This penalty was necessary since utilities' underscheduling of load jeopardized reliable system operations by forcing the ISO to satisfy far more load in real time than the market was intended to supply (i.e., approximately five percent). Therefore, the December 15 Order required all market participants to preschedule their load and imposed penalties when real-time load exceeded more than five percent of an entity's scheduled load.

Following the downgrade of SoCal Edison's and PG&E's credit and debt ratings in January 2001 and the PX's notification to the Commission that it had suspended the

operation of its core markets, SoCal Edison and PG&E filed a request in Docket No. EL01-34-000 for immediate suspension of the underscheduling penalty. These utilities argued that the PX's suspension of the operation of certain markets and their credit and supply problems made it impossible for them to expand their forward purchases. SoCal Edison and PG&E maintained that, given these circumstances, the underscheduling penalty would not provide an incentive to their procurement strategy and instead amounts to an additional tax on their already expensive energy purchases. The Commission explained, however, that it needed further information on the market situation prior to considering whether to grant the utilities' request. Accordingly, on April 6, 2001, the Commission deferred action on the utilities' request to suspend the underscheduling penalty, pending the receipt of market information from the ISO.[16] The ISO filed the requested data on April 23, 2001.

Subsequently, the ISO filed Tariff Amendment No. 38 in Docket No. ER01-1579-000, proposing, in pertinent part, tariff amendments that would suspend the underscheduling penalty effective from January 1, 2001 through May 31, 2001. The Commission rejected the ISO's proposal due to its ongoing consideration of the issue in Docket No. EL01-34-000.[17] The Oversight Board and SoCal Edison filed requests for rehearing arguing that the Commission erred in rejecting the ISO's filing, which, they contend, was shown to be just

16. *Southern California Edison Co. and Pacific Gas and Electric Co.*, 95 FERC ¶ 61,025 (2001).

17. *California Independent System Operator Corp.*, 95 FERC ¶ 61,199 (2001).

and reasonable. In addition, SoCal Edison asserts that the Commission must make a finding on the merits of the filing, and moved to consolidate the docket with Docket No. EL01-34-000.

G. *Subsequent Proceedings Arising from December 15 Order*

As required by the December 15 Order, staff convened a technical conference on January 23, 2001 to explore options for a prospective mitigation and monitoring plan to be in place in May 2001. Staff issued its recommended plan on March 9, 2001, and sought comments from market participants.

H. *March 9 Refund Order*

Also on March 9, the Commission issued an order addressing above-breakpoint transactions that occurred in January, directing refunds from sellers for certain transactions, or alternatively, requiring sellers to submit additional cost or other justification for those transactions.[18] Numerous parties requested rehearing and/or clarification of the March 9 Order. These parties fell into three main categories: sellers of energy, California state entities, and the California IOUs. The principal issues the parties raise are the propriety of the Commission's adoption of a proxy

18. *San Diego Gas & Electric Co., et al.*, 94 FERC ¶ 61,245 (2001) (March 9 Refund Order). The Director of the Office of Markets, Tariffs and Rates issued notices specifying similar transactions for the months of February, March, and April 2001 on March 16, April 16, and May 14, respectively.

price screen in place of either market-based or cost-based rates, the Commission's choice of factors in calculating the proxy price screen, the Commission's adoption of an as-bid option with refund liability, and the Commission's method in applying the refund liability. On May 24, 2001, PG&E and SoCal Edison filed a supplemental request for rehearing and motion to lodge the April 26 Order in the record for the March 9 proceeding.

I. *Prospective Price Mitigation Orders (April 26 and June 19, 2001)*

On April 26, 2001, the Commission issued a prospective mitigation and monitoring plan for wholesale sales through the organized real-time markets operated by the ISO,[19] and established an inquiry in Docket No. EL01-68-000 into whether a price mitigation plan should be implemented throughout the Western Systems Coordinating Council (WSCC). Elements of the plan included:

• Enhancing the ISO's ability to coordinate and control planned outages during all hours.

• Requiring sellers with Participating Generator Agreements (PGAs), as well as governmental entity generators located in California that voluntarily make sales through the ISO's markets or use the ISO's interstate transmission grid (with the exception of hydroelectric power), to offer all their available power in real time during all hours.

19. The April 26 Order also required the ISO to submit a compliance filing. The submission, filed on May 11, 2001 in Docket No. EL00-95-034, et al., is addressed in a separate order to be issued concurrently with this order.

• Establishing conditions, including refund liability, on public utility sellers' market-based rate authority to prevent anticompetitive bidding behavior in the real-time market during all hours.

• Establishing a mechanism for price mitigation for all sellers (excluding out-of-state generators) bidding into the ISO's real-time market during a reserve deficiency, i.e., when reserves fall below 7 percent. Under this mechanism, the Commission established a formula (based on gas-fired generation) that the ISO can use to establish the market clearing price when mitigation applies (mitigated reserve deficiency MCP).[20] Higher bids were permitted if they could be justified.

The Commission acted on requests for rehearing and clarification of the April 26 Order on June 19, 2001, modifying and expanding the mitigation plan in significant aspects. In the same order, the Commission instituted an investigation pursuant to section 206 of the FPA into public utility rates for spot markets sales in the WSCC.[21] Key elements of the mitigation plan, to be in effect from June 21, 2001 through September 30, 2002, include:

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20. The mitigated reserve deficiency MCP is the marginal cost of the last unit dispatched to serve the last increment of load during a period of reserve deficiency. The marginal cost of each unit calculated by the ISO based on Commission prescribed inputs is referred to as the "Proxy Price."

21. *San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,418 (2001), *reh'g pending on some issues* (June 19 Order).

• Retaining the use of a single market clearing price with must-offer and marginal cost bidding requirements for sales in the ISO's spot markets in reserve deficiency hours (i.e.,when reserves fall below 7 percent).

• Applying that clearing price as a maximum price for sales outside the ISO's single price auctions (bilateral sales in California and the rest of the WSCC), with sellers outside the single price auction receiving the prices they negotiate up to this maximum price.

• Using eighty-five percent of the highest ISO hourly mitigated reserve deficiency MCP established during the hours of the last Stage 1 alert for the mitigated non-reserve deficiency Market Clearing Price (mitigated non-reserve deficiency MCP) for subsequent non-reserve deficiency hours.

• Instructing bidders to invoice the ISO directly for the cost to comply with emissions requirements and for start-up fuel costs, which are too varied to be standardized in a single market clearing price.

• Allowing sellers other than marketers the opportunity to justify bids or prices above the maximum prices.

• Requiring all utilities who own or control generation in California to offer power in the ISO's spot markets, and requiring all utilities in the remainder of the WSCC to offer in the spot market of their choosing any non-hydroelectric resource to the extent its output is not already committed ("must-offer requirement").

Finally, the Commission announced that it would establish a settlement conference before an Administrative Law Judge in order to resolve refund issues for sales through the ISO and PX spot markets for past periods, among other things.[22]

Among other issues, parties sought rehearing and/or clarification of the California must-offer and price mitigation revisions, the extension of price mitigation to all hours, the bid justification provisions, the revised emissions cost collection procedures, the creditworthiness adder, and the scope, price mitigation and must-offer provisions under the West-wide investigation.

The Commission's Chief Judge convened a settlement conference as directed in the June 19 Order, and issued a report and recommendation regarding a refund methodology on July 12, 2001.[23]

J. *July 25 Refund Order*

On July 25, 2001, the Commission issued an order establishing the scope of and methodology for calculating refunds related to transactions in the spot markets operated by the ISO and the PX. The Commission found that

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22. In addition, the order required the ISO to submit a compliance filing. The submission, filed on July 10, 2001 in Docket No. EL00-95-040, *et al.*, is addressed in a separate order to be issued concurrently with this order.

23. *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 63,007 (2001) (Chief Judge's Report).

transactions subject to refund are limited to the period October 2, 2000 through June 20, 2001, but include sales by all sellers into the spot markets operated by the ISO and the PX. The Commission further found that the refund requirements apply to ISO OOM purchases, but not to spot purchases by DWR or ISO purchases made pursuant to DOE orders.

The refund methodology adopted most of the criteria of the June 19 price mitigation plan, modified as to be appropriate for a past, rather than a future, period. Under the methodology, refunds would be determined by the difference between prices charged and a competitive market base-line calculated for each hour of the refund period. Hourly mitigated prices would be developed using the marginal costs of the last unit dispatched to meet load in the ISO's real-time market using:

- Northern and Southern California zone specific spot gas prices, based on a composite of published market prices;

- a $6.00 per MWh adder for non-fuel O&M costs;

- a 10 percent creditworthiness adder for transactions after January 5, 2001;

- interest to be assessed on both refunds and receivables past due.

In addition, suppliers may net demonstrable emissions costs from their refund liability.

The order also established an evidentiary hearing proceeding in order to further develop the factual record so that refunds could be calculated. In addition, the order granted rehearing in part and denied rehearing in part of limited portions of earlier orders.

Finally, the order established a preliminary evidentiary proceeding to explore whether there may have been unjust and unreasonable charges for spot market sales in the Pacific Northwest and to determine the calculation of any refunds associated with such charges. An administrative law judge presided over the proceeding and issued recommendations and proposed findings of fact on September 24, 2001.

Parties seek rehearing of each aspect of the scope and calculation of refunds. They also challenge the adequacy and appropriateness of the evidentiary hearing proceeding and the preliminary evidentiary hearing in the Puget Sound proceeding in Docket No. EL01-10-000. On September 20, 2001, PG&E filed a motion to submit newly obtained evidence in support of its rehearing request. California Generators filed an answer in opposition to the motion on October 5, 2001, and PG&E subsequently responded.

K. *July 25 Order Granting Emergency Motion for Clarification*

On July 25, 2001, the Commission granted Mirant's emergency motion for clarification of the April 26 and June 19 Orders. The Commission found that Mirant presented an adequate showing under those Orders to excuse Mirant from the requirement that it offer all of its available capacity from

certain of its units located at the Potrero Power Plant, because doing so would violate environmental operating limitations set forth in Mirant's permit. The Commission also provided guidance to other suppliers that may be concerned about penalties or damages resulting from citizen suits if they exceed operating limitations in order to comply with the must-offer requirement.

NCPA sought rehearing of the July 25 Clarification Order, claiming that the Commission's guidance does not provide viable alternatives.

Discussion

A. *Procedural Matters*

A number of entities filed late motions to intervene in this proceeding. The Commission ordinarily does not permit late interventions after an order has been issued, particularly for the purpose of requesting rehearing.[24] However, over the course of the SDG&E proceeding, the Commission has expanded the scope of its focus from just California to include the entire Western interconnect and also to implicate wholesale spot market transactions of governmental entities and cooperatives and bilateral spot market transactions. We find good cause, therefore, to grant the untimely, unopposed motions to intervene in Docket No. EL00-95-000 filed by Nevada Independent Energy Cooperative and Cogeneration

24. *See, e.g., Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000); *Consolidated Edison, Inc. and Northeast Utilities*, 92 FERC ¶ 61,014 (2000), *order denying reh'g*, 94 FERC ¶ 61,079 (2001).

Coalition of Washington (jointly) (Nevada IEC/CC Washington) and Tri-State Generation and Transmission Association that were both filed on May 17, 2001, and the untimely, unopposed motions to intervene of Public Utility District No. 1 of Chelan County, Washington (Chelan County), RAMCO, Deseret Generation and Transmission Cooperative (Deseret), Truckee Donner Public Utility District (Truckee Donner), Utah Associated Municipal Power System (Utah AMPS), Public Utility Commission of Oregon and Oregon Office of Energy (jointly), and Sunrise Power Company LLC and Harbor Cogeneration Company (jointly) (Sunrise and Harbor), which were filed on July 19 or July 20, 2001.[25]

These intervenors must accept the record as it had developed as of the date of their intervention, and their participation in this proceeding is limited to the issues that arose after the date each requested to participate in these proceedings. Thus, the requests for rehearing of the June 19 Order filed by Chelan County, Deseret, RAMCO, Sunrise and Harbor, Truckee Donner, and Utah AMPS will be dismissed because they were not parties as of the date that order was issued. The July 25 Order granted the intervention of Attorney General of California as of July 17, 2001 (the date it requested intervention). Therefore its request for rehearing of the June 19 Order will likewise be dismissed, as it was not a party on June 19, 2001. Similarly, APPA's

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25. Arizona Electric Power Cooperative, Inc. (AEPCO) filed a motion to intervene out-of-time on August 24, 2001. AEPCO is already a party in this proceeding by virtue of its intervention request granted by Chief Judge Wagner; therefore, we need not address its subsequent motion to intervene.

request for rehearing of the March 9 Refund Order will be dismissed because it had not requested intervention prior to the date that order was issued.

On November 23, 2001, the Institute for Legal Reform of the Chamber of Commerce of the United States (Institute) moved to intervene for the limited purpose of filing a brief concerning developments in California state court proceedings involving allegations of state antitrust violations that could purportedly affect the implementation of the Commission's market mitigation plan. The Institute states that the issues can be resolved on the existing record, that there will be no prejudice to or burden on other parties, and that its proposed relief will not require any delay in the proceeding. The People of the State of California, ex rel. Bill Lockyer (Attorney General of California) and the City of Tacoma, Washington and the Port of Seattle, Washington oppose the Institute's intervention on the grounds that its intervention will disrupt the proceeding and that the interests the Institute represents are already adequately represented. We find, contrary to the Attorney General's assertions, that the Institute's late intervention for the purpose of filing its brief will not prejudice or place additional burdens upon the existing parties, that it will not disrupt the proceeding, and that the Institute's interest is not adequately represented by other parties in the proceeding. Therefore, we will grant the Institute's untimely motion to intervene. We find, however, that the Institute's arguments need not be resolved here; we will address this pleading in a future order.

Appendix D

Section 313(a) of the FPA requires an aggrieved party to file a request for rehearing within thirty days after the issuance of the Commission's order, in the case of the June 19 Order, by July 19, 2001. Because the 30-day deadline for requesting rehearing is statutorily based, it cannot be extended, and the requests for rehearing of Truckee Donner, and Utah AMPS filed on July 20, 2001 (dismissed above because they lacked party status) are also dismissed as untimely.[26] Further, requests for rehearing of the July 25 Order were required to be filed by August 24, 2001, and, therefore, TransAlta's request for rehearing filed on August 27, 2001 (dismissed above because it lacked party status) is also dismissed as untimely.

Portland General and the City of Seattle seek clarification of their party status in Docket No. EL01-68-000. Both had timely intervened in Docket No. EL00-95-000, et al., but had not intervened separately in Docket No. EL01-68-000. We will clarify that these two entities, and any others who intervened in Docket No. EL00-95-000, et al., are entitled to full party status in Docket No. EL01-68-000, regardless of whether they filed a motion to intervene. Likewise, for the same reasons, any entities who have intervened in Docket No. EL01-68-000 are entitled to full party status in Docket

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26. We will, however, grant these parties' late motions to intervene, as of the dates their motions were filed, because of lack of procedural clarity about the deadline for interventions. Further, we will treat comments submitted without a formal motion to intervene as intervention requests, because of the potentially confusing procedural stance of Docket No. EL01-68-000. Thus, Avista Utilities is a party in this proceeding as of the date its comments were filed, May 7, 2001.

No. EL00-95-000, et al., as of the date of their intervention requests in Docket No. EL01-68-000.[27]

Cities/M-S-R seek to correct the Appendices to the June 19 Order, which listed "M-S-R Public Power Agency, et al." as the entity seeking rehearing of the April 26 Order, to reflect that the Cities of Santa Clara and Redding, California also sought rehearing, and to reflect correctly which entities had filed comments and intervened in Docket No. EL01-68-000. We acknowledge that Santa Clara and Redding requested rehearing of the April 26 Order jointly with M-S-R. The relief provided above permitting all intervenors in Docket No. EL00-95-000, et al., to have party status in Docket No. EL01-68-000 should resolve Cities/M-S-R's other concerns.

On May 24, 2001, SoCal Edison and PG&E filed a supplement to their request for rehearing of the March 9 Order, or alternatively a motion to lodge the April 26 Order in that rehearing proceeding. We will reject these companies' request to supplement their requests for rehearing as we have no authority to accept materials in support of rehearing if such materials are filed after the 30-day statutory deadline for submitting materials in support of rehearing.[28] Further, the Commission is already fully considering the April 26

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27. Thus, Chelan County has intervenor status in Docket No. EL00-95-000 by virtue of its motion to intervene in Docket No. EL01-68-000 filed on July 19, 2001, and its request for rehearing of the July 25 Order will therefore be accepted.

28. *See, e.g., Southern Company Services, Inc.*, 57 FERC ¶ 61,093 at 61,344 and n.79 (1991); and Public Service Company of New Hampshire, 65 FERC ¶ 61,105 at 61,403 and n.16 (1991).

Order and its effect on prior orders. Accordingly, we deny the alternative motion.

On September 30, 2001, PG&E filed a motion to submit newly obtained evidence in support of its request for rehearing of the July 25 Order. We will reject this request to supplement PG&E's request for rehearing because we have no authority to accept materials in support of rehearing if such materials are filed after the 30-day statutory deadline for submitting materials in support of rehearing.[29] We will also reject California Generators' filing in opposition to the motion, and PG&E's response.

Pursuant to *Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.713*, answers to requests for rehearing normally are prohibited. Accordingly, we will reject Dynegy's and Duke's answers to the rehearing requests of the August 23 Order, the ISO's answer to rehearing requests of the July 25 Order, and Powerex's answer to the Oversight Board's request for rehearing of the July 25 Order.

In view of the early stage of the proceeding in Docket No. EL01-34-000 and the absence of any undue prejudice or delay, we will grant the motion to intervene out-of-time of Dynegy Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation, LLC, Cabrillo Power I LLC and Cabrillo Power II LLC (collectively, Dynegy). As the Commission is considering both Docket No. ER01-1579-000

29. *See id.* and *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,623 (1991) (rejecting pleadings even when filed in support of timely-filed requests for rehearing).

and Docket No. EL01-34-000 in this order, and the proceedings are not being set for hearing, there is no need to consolidate the dockets; thus, we will deny Dynegy's motion to consolidate. Similarly, we will deny Dynegy's motion to lodge its motion to intervene and protest that was filed in Docket No. ER01-1579-000 in the record for Docket No. EL01-34-000.

While, for organizational purposes, we may address the issues raised on rehearing of different orders in separate sections of this order, our discussions and holding in any section regarding a specific issue also raised on rehearing of another order or orders apply to all rehearings on that specific issue.

B. *Rehearing of Issues Surrounding Level and Scope of Mitigated Prices*

1. *Scope of Transactions Subject to Mitigation and Refund*

a. Applicability to Sales by Governmental Entities

Requests for Rehearing

Several governmental entities[30] contend that the Commission erred in ordering them to make refunds

30. *See, e.g.*, Requests for Rehearing of Bonneville Power Administration (Bonneville) at 2-18, DSI Companies (adopting Bonneville's arguments), NCPA at 9-17, APPA at 2-9, Turlock at 5-20, Burbank (virtually identical to Turlock), Imperial (virtually

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regarding their sales in the FERC-regulated ISO and PX markets. They argue that: the Commission's rate and refund authority under FPA sections 205 and 206 applies only to "public utilities;" that FPA section 201(f) expressly exempts governmental entities from FERC jurisdiction unless the statute specifically provides otherwise; the Commission does not have subject matter jurisdiction over governmental entities' sales into the FERC-regulated PX and ISO markets because section 201(f) overrides the more general statutory provision in section 201(b); the refund holding here nullifies FPA section 201(f); and FPA subject matter jurisdiction is determined solely by whether the seller is subject to jurisdiction under the FPA.

Governmental entities further assert that: the Commission cannot indirectly exercise jurisdiction over governmental entities because it cannot directly do so; the public interest cannot override FPA jurisdictional limitations; the finding that the underlying goals of the FPA are promoted by placing all sellers in these markets on the same footing for refund purposes is inapposite and unconvincing; if the Commission has jurisdiction here, governmental entities would have been subject to full jurisdiction under the FPA merely by using public utilities' transmission systems to make sales for resale; governmental entities will be forced to choose between subjecting themselves to FERC regulation

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(Cont'd)
identical to Turlock), LADWP at 5-7, 10-12, Southern Cities at 3-12, Pasadena at 3-7, PUD No. 2 (virtually identical to Southern Cities), Metropolitan at 4-13, Cities/M-S-R at 6-10, Modesto (adopting the arguments raised by Cities/M-S-R), CMUA at 3-15 and AEPCO at 3, 7-14.

or not selling into certain markets, rendering FPA 201(f) superfluous; any regulatory gap that exists regarding governmental entities was intentional on Congress' part; and no regulatory gap exists because the rates for power sold by governmental entities are regulated by local authorities.

Moreover, governmental entities argue that: ordering governmental entities to make refunds is contrary to Commission and court precedent; the Commission changed its policy regarding governmental entities without providing a reasonable basis for doing so; they did not and could not waive the Commission's lack of subject matter jurisdiction when they made sales in the FERC-regulated ISO and PX markets; basing the Commission's jurisdictional finding on the ISO and PX tariffs and certain agreements executed by governmental entities violated the filed rate doctrine because those documents do not expressly require governmental entities to make refunds; they had no notice that their power sales in the FERC-regulated ISO and PX markets were subject to refund; and the Commission cannot create jurisdiction by placing parties on notice that it intends to exercise jurisdiction or by approving a particular market structure.

Additionally, governmental entities assert that: most governmental entities did not execute the pro-forma scheduling coordination agreements; the Commission failed to provide adequate notice that sales of electricity by governmental entities in the ISO or PX would be subject to refund, violating due process (i.e., the right to notice and a meaningful opportunity to be heard); the refund holding regarding governmental entities is inconsistent with the

holding regarding refunds for the period prior to October 2, 2000; even if the Commission could condition governmental entities' sales into these FERC-regulated markets on their agreement to assume refund liability, no such condition was imposed; and the equities do not support refunds on sales by certain governmental entities.

Salt River agrees with the refund result of the July 25 Order, but disagrees with the order's rationale for the same reasons given by the governmental entities that oppose the refund order. Salt River suggests that the Commission should focus more narrowly on the specific terms and conditions of the FERC-regulated PX and ISO Tariffs that governmental entities voluntarily and explicitly agreed to abide by, including provisions that authorize the recalculation and issuance of revised settlement statements.

Commission Response

i. Statutory Framework

It is undisputed that the Commission has personal jurisdiction over the PX and ISO, and that they operate pursuant to FERC-approved tariffs and wholesale rate schedules.[31] Moreover, the PX and ISO are public utilities under FPA section 201(e).[32] The Commission's subject matter

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31. FPA § 201(b).

32. *In re California Power Exchange Corporation*, 245 F.3d 1110, 1114 (2001); *Pacific Gas & Electric Co.*, 77 FERC ¶ 61,204 (1996), *reh'g denied*, 81 FERC ¶ 61,122 (1997).

jurisdiction includes wholesale sales (defined as "sale[s] of electric energy to any person for resale" [33]) of electric energy in interstate commerce.[34] As all of the electric energy sales into the FERC-regulated PX or ISO spot markets are wholesale sales of electricity in interstate commerce, they all fall within the Commission's subject matter jurisdiction.[35]

The exemption for governmental entities in FPA section 201(f)[36] does not require a different result regarding sales by governmental entities in the PX and ISO spot markets. While that provision exempts governmental entities generally from Commission jurisdiction under Part II of the FPA, it does not do so under the specific circumstances here. Here, governmental entities and others sold energy in a centralized, single clearing price auction market under which all sellers received the same price for a given sale, pursuant to market rules set by this Commission and administered by public utilities (the California PX and ISO) subject to this Commission's jurisdiction. The involvement of the PX and ISO, whose roles are central in these California spot markets, along with the nature of the interstate wholesale sales, give us subject matter jurisdiction entirely independent of the

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33. FPA § 201(d).

34. July 25 Order, 96 FERC at 61,511 (*citing* FPA § 201(b)).

35. FPA § 201(b).

36. FPA § 201(f) provides that "[n]o provision in this Part [of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing ... unless such provision makes specific reference thereto."

jurisdictional nature of the entities selling into the markets at issue.[37] Thus, FPA section 201(f) does not change the analysis or the result in determining whether we have subject matter jurisdiction over the sales at issue.[38]

Moreover, governmental entities that made sales in the PX and ISO spot markets waived any exemption they otherwise may have had from the Commission's personal jurisdiction regarding those sales.[39] Because the markets did not exist prior to FERC authorization and operate according to FERC rules, all those who participated in them reasonably had to recognize the controlling weight of FERC authority. The PX and ISO operated under FERC-approved tariffs, which set forth all rates, charges, classifications, practices, rules, regulations or contracts for or in connection with all sales made in their markets.[40] The tariffs established spot market auction mechanisms that made clear that all sellers, including governmental entities, would receive the same FERC-regulated market clearing price for any given sale. That price, under the FPA, could not exceed the just and

37. *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (UDC).

38. As the Commission can directly regulate the sales at issue regardless of who made the sales, this is not a case of the Commission indirectly exercising jurisdiction over governmental entities when it cannot do so directly.

39. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985).

40. *See* FPA § 205(c); 18 C.F.R. §§ 35.1(a) and (e), 35.2(a) and (b) and n.1; *Pacific Gas & Electric Co.*, 77 FERC ¶ 61,204 at 61,804 (1996).

reasonable rate. All sellers were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change and refund if they were found to be unjust and unreasonable.

We made clear in our order authorizing establishment of the PX and the ISO that, "[o]nce filed, the rate schedules and related contracts, rules and protocols will be subject to the exclusive jurisdiction of the Commission under sections 205 and 206 of the FPA, 16 U.S.C. sections 824d, 824e (1994)."[41] Thus, all sellers in the PX and ISO markets, including governmental entities, were on notice that if they participated in those markets, they would do so subject to the terms of the ISO and PX tariffs and concomitant FERC jurisdiction. Our order authorizing the PX and ISO to operate provided further notice that the same rules and obligations applied to all sellers and sales made in the PX and ISO spot markets. For example, the order established that all PX and ISO rules, protocols, procedures and standards applied to all entities selling energy in the PX and ISO markets.[42] Furthermore, the December 15 Order discussed refunds as applying to "all sellers into the markets operated by the ISO and the PX."[43]

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41. Pacific Gas & Electric Co., 77 FERC at 61,804.

42. *Pacific Gas & Electric Co.*, 81 FERC ¶ 61,122 at 61,580-87 (1997).

43. December 15 Order, 93 FERC at 62,011. The Commission's deviation from this in the November 1 Order, by using the term "public utility sellers" in the title of the section discussing potential refund liability, does not negate that governmental entities had notice that their sales in the PX and ISO spot markets could be subject to refunds.

Appendix D

Governmental entities or their agents entered into various arrangements that explicitly acknowledged the Commission's jurisdiction regarding their sales in the PX and the ISO. For example, many governmental entities[44] accepted a FERC-approved pro-forma Scheduling Coordinator Agreement that explicitly acknowledges their obligation "to comply with the terms and conditions of the ISO Tariff and ISO Protocols."[45] Moreover, numerous governmental entities[46] executed the FERC-approved pro-forma PX Participation Agreement, which "establishes the basis and terms upon which entities shall receive service through the PX, in accordance with the PX Tariff and Protocols."[47] In approving the pro-forma PX Participation Agreement, we found that it and "the services provided under the PX Tariff are jurisdictional" and needed to be filed with the Commission in accordance with FPA section 205(c).[48]

We reiterate our finding that, by participating in the FERC-regulated centralized PX and ISO spot markets, all

44. These sellers included the Cities of Anaheim and Riverside and DWR.

45. *See Pacific Gas and Electric Co.*, 82 FERC ¶ 61,326 at 62,283 (1998).

46. Those entities include the Arizona Electric Power Cooperative (AEPCO), Bonneville, DWR, the Cities of Anaheim and Riverside, LADWP, Modesto, and NCPA. See PX January 25, 2001 letter filing, Docket No. ER98-2095-000 (index of parties who executed the Participation Agreement as of December 31, 2000).

47. *California Power Exchange Corp.*, 83 FERC ¶ 61,186 at 61,770 (1998).

48. *Id.* at 61,771.

sellers, including governmental entities, agreed to accept the same clearing price for any given sale under the single price auction mechanism approved by FERC. We further reiterate that all entities, including governmental, that sold in the PX and ISO spot markets were on notice that they were subject to,[49] and are in fact subject to, FERC jurisdiction regarding the rates to be received for those sales, including FERC rate and refund orders. In the July 25 Order, we acted appropriately pursuant to our authority under FPA section 206 to fix the just and reasonable rate by revising the method for calculating the FERC-regulated PX and ISO spot market clearing prices as of October 2, 2000. In doing so, we simply revised the market clearing prices that all market participants previously agreed to accept for their sales, and ordered refunds to effectuate that revision. Thus, we deny rehearing of the claims that we erred in ordering governmental entities to make refunds regarding their sales in the FERC-regulated ISO and PX markets.

Our refund order does not violate the filed rate doctrine. As our refund authority derives from the FPA, the filed rate doctrine does not require that the ISO and PX tariffs or the agreements executed by governmental entities include an express refund provision. Moreover, because authority for the refund order derives from the Commission's FPA subject matter jurisdiction over the sales themselves, the Commission was not required to condition governmental entities' sales into the FERC-

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49. The March 9 Order at 7 incorrectly indicated that we have no authority to order governmental entities to make refunds here. That statement has no bearing on governmental entities' general notice regarding their sales being subject to FERC jurisdiction under the FPA's just and reasonable standard, including the potential for refund liability.

regulated PX and ISO spot markets on their agreement to assume refund liability. The only filed rates in this case consisted of the ISO and PX tariffs, both of which were subject to the SDG&E complaint and the Commission's section 206 investigation instituted on August 23, 2000, and thus subject to our refund authority.

We are not relying on the public interest to "override" FPA jurisdictional limitations and thus doing indirectly that which we cannot do directly. Rather, the subject matter of the sales here provides us with jurisdiction.[50] As a separate matter, by selling in the PX and ISO spot markets, the governmental entities waived any personal jurisdictional limitations.

ii. Precedent

Including governmental entities in our refund order is not contrary to Commission precedent. Our determination that all sellers, including governmental entities, in the PX and ISO spot markets are liable for refunds is limited to the specific circumstances before us in this case: sales made in FERC-jurisdictional (PX and ISO) spot markets in which all

50. The legislative history indicates that Congress never contemplated a market scenario such as the one here. *See, e.g., To Provide for the Control in the Public Interest of Public Utility Holding Companies Using the Mails and the Facilities of Interstate Commerce, to Regulate the Transmission and Sale of Electric Energy and Natural Gas in Interstate and Foreign Commerce, and for Other Purposes, 1935: Hearings on H.R. 5423 Before the House of Representatives Committee on Interstate and Foreign Commerce*, 74th Cong. 2160 (1935) (statement of Mr. DeVane, Solicitor of the Federal Power Commission).

sellers received the same prices for sales of electric energy for resale in interstate commerce determined by FERC-jurisdictional entities under a single price auction format. None of the cases cited as contravening our holding here presented similar circumstances.

Rather, the cited cases involve much broader factual scenarios, and stand for the unexceptional proposition that FPA section 201(f) generally exempts governmental entities from our jurisdiction.[51] For example, in New West, a governmental entity sought general Commission authorization under FPA section 205 to engage in wholesale electric sales at market-based rates as a power marketer. We rejected the request, finding that the governmental entity was exempt from Commission FPA section 205 rate regulation by virtue of FPA section 201(f). New West is inapposite to our holding here, as that order did not involve a centralized market or single price auction for the sale of electric energy in interstate commerce operated by a public utility subject to our exclusive rate jurisdiction, but rather addressed only the much broader issue of whether the Commission can assert jurisdiction over a governmental entity's interstate wholesale sales as a general matter, regardless of the circumstances under which those sales are made.[52]

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51. *E.g., Prairieland Energy, Inc.*, 92 FERC ¶ 61,139 (2000); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229 (2000); *New West Energy Corp., 83 FERC ¶ 61,004 (1998); Sacramento Municipal Utility District v. Pacific Gas and Electric Co.*, 37 FERC ¶ 61,323 (1986).

52. It also should be noted that we also did not analyze the jurisdictional issues in the cited cases in light of *UDC*. Similarly, the court precedent cited by those requesting rehearing neither involved the limited specific circumstances present here nor considered the jurisdictional matters at issue in light of *UDC*.

Appendix D

Other Commission precedent cited by those seeking rehearing supports our refund holding here. For example, in Order No. 888,[53] we required governmental entities that receive open access transmission service from a public utility to offer comparable service in return. We explained that:

> While we do not have the authority to require non-public utilities to make their systems generally available, we do have the ability, and the obligation, to ensure that open access transmission is as widely available as possible and that this Rule does not result in a competitive disadvantage to public utilities. . . . [W]e will not permit [non-public utilities] open access to jurisdictional transmission without offering comparable service in return.[54]

In *City of Vernon, California*,[55] we held that "the Commission does have the authority to evaluate non-

53. *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,760-62 and 31,857, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. denied in pertinent part*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).

54. Order No. 888 at 31,761-62.

55. 93 FERC ¶ 61,103 at 61,285(2000), *reh'g denied*, 94 FERC ¶ 61,148 (2001).

jurisdictional activities to the extent they affect the Commission's jurisdictional activities." In that case, we required modification of certain rates of a governmental entity that wanted to become a participating transmission owner in the FERC-jurisdictional California ISO. We reviewed the governmental entity's proposed rates "as a means of ensuring that the costs ultimately charged by the ISO are just and reasonable. The Federal Power Act requires us to ensure the justness and reasonableness of the ISO's rates, and we cannot reach this result if we absolve from our review the portion of the ISO's costs incurred with respect to "this governmental entity."[56] The same reasoning applies to the sales at issue here. As here, "the approach we took [in City of Vernon] properly balances our duty to ensure the justness and reasonableness of the ISO's rates with the fact that [[the governmental entity] itself [may not be] jurisdictional for purposes of FPA Section 205 [or 206]."[57]

In short, we have been consistent in our approach regarding the activities of governmental entities as they affect matters subject to our jurisdiction, and have applied it to the specific limited factual scenario presented here.

Our refund holding regarding governmental entities is not inconsistent with our holding regarding refunds for the period prior to October 2, 2000. The subject matter of the sales, in the specific circumstances presented,[58] makes all

56. 94 FERC at 61,564.

57. *Id.*

58. Sales made in FERC-jurisdictional (PX and ISO) spot markets in which all sellers received the same prices for sales of

(Cont'd)

sellers in the PX and ISO spot markets subject to refunds in accordance with FPA section 206. All sellers in those markets reasonably were on notice that their sales were subject to refund, and that, in accordance with FPA section 206, their refund liability would begin no "earlier than the date 60 days after the filing" of a complaint. Sellers were not reasonably on notice that their refund liability would begin prior to October 2, 2000, the date we previously determined would be the refund effective date.[59]

Our interpretation of *UDC* and our action here does not eviscerate the section 201(f) exemption. We reiterate that our ruling here is limited to the specific circumstances presented during a past time period in the California PX and ISO spot markets during which all sellers received the same price for a given transaction. That price was determined by FERC-jurisdictional entities (the PX and ISO) in FERC-jurisdictional markets under a single price auction format, as originally set and later modified by FERC, for sales of electric energy for resale in interstate commerce.

(Cont'd)

electric energy for resale in interstate commerce determined by FERC-jurisdictional entities under a single price auction format.

59. It is true that the Commission's authority to institute investigations of rates, terms or conditions of jurisdictional service under section 206 applies only to public utilities. However, the ISO and PX are two of the public utilities whose rates were made subject to investigation in our August 23 Order, and because the ISO and PX set a single market clearing price for all sellers, both governmental and non-governmental, that sold through their markets, all sellers' rates accordingly were made subject to potential refund as of the October 2, 2000 refund effective date.

Appendix D

The sales that fall within the scope of the July 25 Order amount to a small fraction of all sales made by governmental entities. The Commission has not scrutinized any non-spot market sales by those entities and does not intend to start such scrutiny now. Similarly, governmental entities have not been, and will not now be, subject to filing and other requirements unrelated to the PX and ISO spot markets that attach to non-exempt public utilities. Thus, the Commission is not seeking to expand its jurisdiction to include entities exempted by FPA section 201(f). Rather, in the limited circumstances involved in the California PX and ISO spot markets, the Commission is using its subject matter jurisdiction over those sales to assure compliance by all sellers in those markets with the regulatory regime established by FERC to assure just and reasonable rates for those sales.

Several governmental entities argue that, even if the Commission has jurisdiction to order refunds from them, it should not do so for what they term "policy or 'fundamental fairness' considerations."[60] Among the arguments raised are: governmental entities, as purchasers, had to pay higher electricity prices which negated any benefit of their sales to the ISO or PX spot markets;[61] that they are price takers, not price gougers, and thus could not cause unjust and unreasonable rates;[62] the Commission should focus on those

60. AEPCO at 13.

61. CMUA at 14-15; AEPCO at 14-15 (but also recognizing the potential for refund recovery under the Commission refund proposal).

62. APPA at 8-9; NCPA at 15-16.

who have misused the system and limit refunds to divestiture of "ill-gotten gains",[63] and, ordering refunds creates hardships for governmental entities and their customers.[64]

The FPA grants the Commission discretion in ordering refunds.[65] The Commission's practice has been to order full refunds of any amounts collected above the just and reasonable level, absent contrary equitable considerations.[66] Refunds are restitutionary, rather than punitive, relief.[67] Because the statutory goal of refunds is customer restitution, the Commission does not set refund levels based on a degree of culpability regarding overcollections. Rather, our refund task in this and other cases is to determine objectively the amount of overcollections that should be returned to customers. Here, that means resetting the auction prices to just and reasonable levels that apply to all sellers in that single price auction market. Accordingly, we decline the governmental entities' invitation to determine refunds based on some unidentified measure of blameworthiness.

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63. NCPA at 15.

64. AEPCO at 14; CMUA at 15; APPA at 9.

65. Both FPA § 205(e), 16 U.S.C. § 824d(e) and FPA § 206(b), 16 U.S.C. § 824e(b), indicate the Commission "may"order refunds. See also FPA § 309, 16 U.S.C. § 825h.

66. *E.g., Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1581 (D.C.Cir. 1993).

67. *Towns of Concord, et al. v. FERC*, 955 F.2d 67, 75-76 (D.C.Cir. 1992).

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iii. Reliance on *UDC*

Some parties challenge the Commission's reliance on *UDC*[68] as providing guidance on whether governmental entities could be included in the refund plan for the California PX and ISO spot markets. Among the arguments raised by those parties is that such reliance ignores the fact that the Natural Gas Act (NGA), at issue in *UDC*, "includes no equivalent to FPA section 201(f)."[69] Another argument contends that as *UDC* dealt with FERC authority over transportation, it offers no guidance as to the Commission's authority to regulate rates.[70]

Parties also contend that the result here was driven by a policy decision to fill in a gap without regard to the statutory limitations on the Commission's authority.[71] On a related point, several parties point to our prior orders disclaiming jurisdiction over governmental entities as demonstrating that the July 25 Order breaks with decades of prior practice in implementing the FPA.[72]

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68. 88 F.3d 1105.

69. *See* Requests for Rehearing of Bonneville at 6; Turlock at 18; Southern Cities at 7; MWD at 7; LADWP at 11; M-S-R at 6.

70. *See* Requests for Rehearing of Bonneville at 6; Metropolitan at 8-9; LADWP at 9.

71. *See, e.g.*, Requests for Rehearing of Bonneville at 12-13; AEPCO at 9; Southern Cities at 11-12.

72. *See, e.g.*, Request for Rehearing of Southern Cites at 11.

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We have given careful consideration to all the arguments raised concerning the alleged inapplicability of the approach taken in *UDC* to the instant situation. In our view, that approach does apply here and is consistent with the FPA's statutory plan, and with controlling precedent. Under the specific circumstances presented by the California PX and ISO spot markets in the time period at issue, our decision to make all sellers liable for possible refunds for their sales fulfills our statutory obligation. Accordingly, we deny all requests for rehearing on this point.

Several parties seek to distinguish the applicability of *UDC* on grounds that it "involved terms and conditions of jurisdictional pipelines' transportation service, not non-jurisdictional sales of gas."[73] In *UDC*, however, the court was asked to deal only with the clause in NGA section 1(b) addressing transportation of natural gas in interstate commerce.[74] Thus, the limitation in the *UDC* litigation to the transportation clause resulted from its factual context, not from a statutory restriction. Nothing in *UDC* suggests that the court would have reached a different conclusion had the issue related to jurisdictional sales of gas.[75] As the very next clause of NGA section 1(b) addresses the sale of natural gas for resale in interstate commerce, it seems impossible that the court would not have found such sales to fall within the Commission's subject matter jurisdiction, just as interstate transportation does.

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73. *See, e.g.*, Request for Rehearing of LADPW at 9 (emphasis in original).

74. 88 F.3d at 1151.

75. The Commission disagrees with LADWP's characterization of the sales in the instant matter as non-jurisdictional.

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As the July 25 Order stated, the court ruled "the Commission's jurisdiction attaches to the subject of the capacity release transaction: interstate transportation rights," regardless of whether the Commission had jurisdiction over the particular participants in the transactions.[76] The comparable provision to NGA section 1(b) is FPA section 201(b)(1), which defines FERC jurisdiction as extending "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."

Here, the subject of the California PX and ISO spot market transactions, the sale of electric energy at wholesale in interstate commerce, is likewise a matter explicitly within the Commission's jurisdiction under FPA section 201(b)(1). Accordingly, the Commission can act to assure that the just and reasonable standard is applied to the market clearing prices for all transactions in those markets, as such protection lies at the heart of the Commission's ratemaking responsibilities under the FPA. Under *UDC*, all sellers, including governmental entities, into those markets were subject to and had to abide by FERC regulation of those prices (as well as all other aspects of the rates and conditions affecting them) because the sales are within our FPA jurisdiction.

The payment of refunds cannot be differentiated analytically from other rate conditions that limited the manner in which all sellers could transact sales in those markets. Refunds, under FPA section 206(b), are, like other rate conditions, a means to limit the prices that can be charged

76. 96 FERC at 61,512 (*citing* 88 F.3d at 1152).

consistent with the just and reasonable standard. All rate conditions imposed by the Commission in the California spot markets limited the amount of money that any seller could retain from a sale into those markets.[77] All sellers in those markets, both governmental and non-governmental, accepted without challenge other rate conditions, as originally established and subsequently modified, that limited the terms under which those sales could be made. It follows that all sellers in those markets must comply with our refund conditions.

Parties try to distinguish *UDC* on grounds that "the NGA does not have a specific, express exemption for municipalities like that in Section 201(f) of the FPA."[78] Others suggest that our prior rulings finding governmental agencies not subject to our jurisdiction preclude reliance on *UDC*. Again, we find no support for these views in that case. The court in *UDC* accepted the municipalities' statement that they "are exempt from the Commission's jurisdiction under the NGA."[79] In addition, the court recognized that the Commission had "twice rejected the suggestion that it should invoke its

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77. For example, the markets originally used a single price auction system under which the highest price bid and accepted set the clearing price for all sellers. The Commission then instituted a $150/MW breakpoint above which any sales would not set a market clearing price. "The $150 breakpoint thus represents a limitation on the single price auction format of the CalPX spot markets." California Power Exchange Corp., 345 F.3d 1110, 1118 (9th Cir. 2001).

78. *See, e.g.*, Request for Rehearing of Bonneville at 18; see also Request for Rehearing of M-S-R at 6 (same).

79. 88 F.3d at 1153 (emphasis added).

transportation jurisdiction over municipalities."[80] Thus, as presented, the underlying issue in *UDC* is essentially identical to the issue presented here despite the difference in statutory language.

As the court stated, "notwithstanding" the statutory exemption and prior agency decisions to the contrary, "FERC may, consistent with the NGA, require municipalities to comply with the capacity release regulations."[81] The key factor again was that "FERC's transportation jurisdiction extends *as a separate matter* over capacity release given the involvement of interstate *pipelines*."[82] Likewise, here, the involvement of jurisdictional public utilities (the PX and ISO), whose role, like the pipelines' role in *UDC*, "is absolutely central, and the transaction itself controls access" to the interstate wholesale sale of electric energy in the California spot markets at issue, gives us subject matter jurisdiction "entirely independent of the jurisdictional nature" of the entities selling into the markets at issue.[83] Thus, the presence of FPA section 201(f) does not change the analysis or the result in addressing whether we have subject matter jurisdiction over all sales involved.

It is asserted that the "issue in this case is the Commission's rate authority under sections 205 and 206 of

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80. *Id.*

81. 88 F.3d at 1154.

82. *Id.* (first emphasis added; second in original).

83. *Id.*

the FPA," not jurisdictional issues as was true in *UDC*.[84] But this fails to acknowledge the importance of a threshold jurisdictional ruling. If we lack jurisdiction under FPA section 201(b)(1), then the issue of the Commission's rate authority under sections 205 and 206 never arises. In any event, the substantive statutory provision in the *UDC* case, like that in this case, concerned the Commission's ratemaking authority.[85]

It is also asserted that reliance on *UDC* is nothing more than an effort to avoid a regulatory gap[86] or to effectuate policy based on equitable considerations. In this respect, it is charged that avoiding a regulatory gap "is a subject for Congress, and not the Commission . . . to address," and that policy determinations are irrelevant to the statutory question at hand.[87] That is not the teaching of the case law, which "counsels inquiry into the necessary consequences of

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84. *See* Request for Rehearing of Bonneville at 5-6.

85. *See UDC*, 88 F.3d at 1154 n. 65 ("in instituting the capacity release program, the Commission legitimately invoked its authority under NGA section 5," which is the counterpart of FPA section 206).

86. In this respect, we wish to clear up a potentially confusing statement in the July 25 Order, 96 FERC at 61,512, where it was stated that California "declined to regulate California non-public utilities' sales in the California centralized ISO and PX spot markets." California is, of course, free to regulate or not to regulate sales within its jurisdiction. The sales at issue, however, are sales for resale in interstate commerce via a single price auction that is implemented by public utilities pursuant to tariffs within this Commission's exclusive jurisdiction.

87. *See* Requests for Rehearing of AEPCO at 9; Southern Cities at 11.

[whether otherwise nonjurisdictional sales should be subject to the federal plan] in terms of the scope of federal and state regulatory authority in the premises."[88]

iv. Retroactivity

With regard to the July 25 Order's discussion of retroactivity, various parties challenge the relevance of the retroactivity principle to the instant situation, as well as the Commission's application of the five-part test for determining whether an adjudicatory ruling should be applied retroactively.[89]

As stated in the July 25 Order, under the retroactivity principle, adjudications are to be given retroactive effect for similarly situated parties.[90] It is argued that the principle is irrelevant here because similarly situated parties are not

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88. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1972). *See also, e.g., West v. Gibson*, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in the law or in the world, require their application.").

89. *See, e.g.*, Requests for Rehearing of AEPCO at 10-13; LADWP at 12-15; Bonneville at 18-20.

90. 96 FERC at 61,513 (citing *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94-95 (1993) ("the fundamental rule of retrospective operation that has governed judicial decisions for near a thousand years")). *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) ("selective prospectivity also breaches the principle that litigants in similar situations should be treated the same"); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1781, 1789 (D.C. Cir. 1995)(same).

involved. According to Bonneville, the retroactivity principle would apply if in one case, the Commission announced a new rule of law that a "governmental seller" must pay a refund, then in another pending case, that new rule could be applied to a different "governmental seller."[91] But, here, "there is no particular litigant before the Commission," and thus the principle does not apply.[92] That analysis ignores a basic point we have repeatedly made: sales through the markets operated by the jurisdictional ISO and PX, not parties, are the subject matter of this proceeding.

In the July 25 Order, the Commission found that all sales priced above certain levels in the ISO and PX spot markets were unjust and unreasonable, and ordered refunds to remedy receipt of amounts above the just and reasonable level. Viewed from this perspective, all sales for resale in the California PX and ISO spot markets are similarly situated, regardless of whether they were made by governmental or non-governmental sellers. Under the single price auction method, where all sellers received the highest price bid and accepted, it would be impossible to reach any other conclusion. In some cases, we assume that the price received by all sellers under the auction format resulted because a non-governmental seller bid the highest price accepted. In other cases, we assume the price received by all sellers resulted because a governmental seller bid the highest price

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91. Request for Rehearing of Bonneville at 20.

92. *Id.* at 21. Bonneville also claims the proceeding "partakes more of rulemaking than adjudication," and thus can be applied only prospectively. Id. As was discussed in the July 25 Order, 96 FERC at 61,513-14, and again below, this case is an adjudication.

accepted. In other words, the amount of the highest bid accepted, not the identity of the bidder, controlled the price received by all sellers.

In those circumstances, all sales are similarly situated, as are all sellers with regard to what price they received in any individual sales transaction.[93] Given this similarity, there is no reason for selective prospectivity with governmental sellers being free from refund obligations related to sales for which they received the exact same prices as did non-governmental sellers when those prices have been determined, as here, to be unjust and unreasonable. Accordingly, the retroactivity principle counsels that refund obligations apply to all sellers.

Another set of challenges contends that under a test for determining if retroactivity is appropriate that retroactive application to governmental entities fails on all five counts.[94]

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93. Bonneville's example might be apt if there were two markets operating. In one, only governmental sellers participated, while in the other only non-governmental sellers participated, and the two markets showed wholly different pricing patterns. In that hypothetical, a finding that prices in the non-governmental market were unlawful might not be immediately applicable to the governmental market. But the California PX and ISO spot markets did not consist of separate markets for governmental and non-governmental sellers; rather, both types of sellers transacted under the same set of rules and received the same price for a particular sale.

94. *See, e.g.*, Request for Rehearing of LADWP at 12. *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-55 (D.C.Cir. 1993).

Those challenges largely hinge on whether the situation presents a case of first impression, as found in the July 25 Order.

The challengers claim this is not a case of first impression, resting on a view that "Congress decided the matter in 1935,"[95] or that the Commission "overlooks a history of more than 50 years,"[96] or a history of "over thirty years,"[97] during which the Commission did not assert jurisdiction over governmental entities. To reiterate, the July 25 Order asserts jurisdiction over sales for resale in interstate commerce that occurred during the relevant time period in the California PX and ISO spot markets, not over governmental entities. But that aside, the challenges reflect a view that the FPA is static and rigid, rather than dynamic and flexible, in the face of new factual circumstances. That is not the law.

The July 25 Order found this to be a case of first impression because "the Commission had never dealt with market-wide refunds in a single price auction for widespread centralized spot purchases of wholesale electricity in interstate commerce."[98] The challengers' assertion that this situation did "not suddenly convert this question into one of first impression,"[99] ignores the teaching from the earliest

95. *See* Request for Rehearing of LADWP at 13.

96. *See* Request for Rehearing of Bonneville at 21.

97. *See* Request for Rehearing of AEPCO at 11.

98. 96 FERC at 61,514.

99. *See* Request for Rehearing of Bonneville at 21.

cases that agencies must be able "within the ambit of their statutory authority, to make *the pragmatic adjustments which may be called for by particular circumstances.*" [100] Thus, the particular circumstances present here are critical to determining how the FPA should be applied.

Defining the appropriate regulatory response cannot be divorced from the particular circumstances facing the Commission.[101] More recently, the Ninth Circuit looked at the particular circumstances facing the Commission in the California markets to find that while "FERC's termination of CalPX's rate schedules was perhaps unprecedented, we are not convinced that FERC lacks authority under section 206(a) of the FPA to address the structural flaws of a market-based rate regime through the termination of a public utility's wholesale tariff and rate schedules in circumstances such as these." [102]

Thus, the FPA cannot be interpreted in a vacuum, but must be adapted to fulfill its purposes as specific circumstances require. As the Commission has never interpreted how the FPA should be adapted to fulfill its

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100. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)(emphasis added).

101. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 774-77 (1968) (rejecting challenges that adoption of area rates exceeded the Commission's NGA authority, was inconsistent with the statutory language, and prior Court decisions on grounds that Congress gave adequate authority "to achieve with reasonable effectiveness the purposes" underlying the statutory grant).

102. *California Power Exchange*, 245 F.3d at 1122 (emphasis added).

purposes in the particular circumstances here, which reflect a new ratemaking paradigm, this case is one of first impression.

On the second criterion, the challengers claim that the July 25 Order represents an abrupt departure from well-settled law, rather than an effort to fill a void in an unsettled area of law.[103] But, as noted above, the Commission has never addressed the legal question of how refunds should apply in these particular circumstances, and thus the ruling is properly seen as an effort to fill a void in an unsettled area. All challengers point to our March 9 Order, which stated, "[t]he Commission has no authority to order [[governmental] sellers to make refunds" as well as to the acknowledgment in the July 25 Order of similar statements. In the context of this case, the March 9 Order does not constitute well-settled law. Not only was the Order subject to numerous rehearing requests, but also it was in place for only four months before issuance of the July 25 Order, which, upon further analysis and consideration, changed many other aspects of the March 9 Order's refund proposal.

The challengers place the remaining criteria together to claim that they reasonably relied on "sixty-six plus years of unbroken precedent,"[104] and that they were "not subject to Commission regulation."[105] But, again, the Commission is not asserting jurisdiction over them, but only over the interstate sales for resale that they made in the California

103. *See, e.g.*, Request for Rehearing of LADWP at 13.

104. *See* Request for Rehearing of LADWP at 14.

105. *See* Request for Rehearing of Bonneville at 23.

PX and ISO spot markets, which were established and regulated entirely under Commission FPA authority. As early as the August 23 Order responding to complaints that sales in those markets might exceed the just and reasonable standard, and well before the October 2 refund effective date, governmental and non-governmental sellers were aware that possible remedies for all sales violating that standard in those markets included refund liability.

We see no reason that reliance on generalized statements related to wholly different situations should prevail over a clear indication of what our course would be in the particular circumstances at issue. Likewise, it is not an undue burden for governmental sellers to refund amounts received over and above the just and reasonable prices allowed by the Commission for these sales. Under the single price auction format, governmental sellers could expect no higher price than what all other sellers received for the same transactions, and under the FPA, that price could not exceed the just and reasonable standard. Selective prospectivity, as the challengers propose, flies in the face of the FPA's primary statutory interest of preventing exploitation of consumers. Accordingly, retroactive application of refund obligations for all sellers is favored here.

vi. Adjudication v. Rulemaking

Several governmental entities contend that this proceeding, as it relates to governmental entities, is more of a rulemaking than adjudication.[106] For example, NCPA argues that the July 25 Order represented a significant departure from an established policy. NCPA asserts that such a shift in policy, without notice

106. *See, e.g.*, Requests for Rehearing of NCPA, Bonneville, APPA.

or opportunity for affected parties (e.g., municipals) to comment, violated the rulemaking requirements of the Administrative Procedure Act. It contends that the jurisdictional expansion constitutes a rulemaking under 5 U.S.C. section 551(a), because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy relating to future rates, valuations, and costs. NCPA also contends that the July 25 Order violates municipalities' procedural due process rights.

This case involves the extent to which refunds are owed for sales made in the California PX and ISO spot markets for a defined past period. In view of this, the case involves an adjudication, consistent with the terms of 5 U.S.C. 551(6) and (7). The 1947 Attorney General's Manual on the Administrative Procedure Act (at 14) states that "adjudication is concerned with the determination of past and present rights and liabilities." Clearly, that is what is involved here.

In addition, our ruling here is based on specific past events in the California ISO and PX spot markets. It is highly unlikely that those same circumstances will be repeated or, if they are, that they will reoccur on a widespread basis. Accordingly, there is no reason for the Commission to formulate a policy to cover that eventuality. Nor do we see any due process problems with the approach that we have taken. The July 25 Order explained in detail the reasons for our decision. Parties have addressed those reasons in their rehearing requests and presented their countervailing arguments. Those arguments have been fully considered and addressed in this order. No further procedure is needed to ventilate these issues.

Accordingly, the requests for rehearing based on claims that the issues presented must be resolved through rulemaking are denied.

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3. *Other Refund Issues*

a. *The July 25 Refund Methodology was Properly Applied to All Sales at Issue*

Many marketers and generators challenge the Commission's determination that prices charged were unjust and unreasonable. For example, EPSA and Williams argue that refunds are inappropriate because the Commission made no finding that any market participant exercised market power, never defined market power, and made no factual determination that warrants refunds in all hours. Others complain that the Commission made no findings that rates were unreasonably high or were increased above reasonable levels through market power.[250] Many assert that the Commission's findings violate section 206 of the FPA and the Administrative Procedure Act because there was no record evidence supporting those findings and because sellers were not afforded due process to address the issue on the record.[251] Williams and Reliant contend that the Commission erred by imposing refunds without substantial record evidence in

250. *See, e.g.*, Requests for Rehearing of Mirant, Nevada IEC/CC Washington, PSNM, Dynegy, Duke.

251. *See, e.g.*, Requests for Rehearing of Williams, Mirant, Nevada IEC/CC Washington, Marketer Group.

support. As a result, these parties argue that imposing refunds violates the rule against retroactive ratemaking, the filed rate doctrine, and the Mobile Sierra doctrine.[252] In addition, they argue that the July 25 Order is contrary to long-standing precedent regarding retroactive rule changes and that the Commission erred in providing inadequate notice and explanation of changes in its policies.[253]

A number of parties argue that the filed rate doctrine forbids the Commission from ordering refunds with respect to transactions that were conducted in accordance with all Commission-approved rules (*e.g.*, breakpoints, price caps or proxy prices) in effect at the time of the transactions.[254] They argue that the filed rate may be a formula rate and that a market-based rate is a formula rate, with the formula comprising the rules that govern the functioning of the market. With respect to the ISO and PX spot markets during the relevant periods, they argue that the rules that governed the functioning of the markets were the individual sellers' market-based rate authorizations, the Commission-approved ISO and PX tariffs, and the various Commission orders in effect at particular times. They argue that, if the Commission has never determined that an individual seller has not acted in accordance with its market-based tariff, the ISO and PX

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252. *See, e.g.*, Requests for Rehearing of BP, Duke, EPSA, Marketer Group, Nevada IEC/CC Washington, CAC.

253. *See, e.g.*, Requests for Rehearing of PacifiCorp, EPSA, PSNM. These issues are addressed elsewhere in this order.

254 *See, e.g.*, Requests for Rehearing of Marketer Group, PSNM, LADWP.

tariffs and the Commission's orders, there is no basis for the determination that the seller make refunds.

According to PSNM, just as purchasers must be on notice of the rates that they may be charged, the filed rate doctrine requires that sellers be on notice of the rules that will govern their rates. PSNM contends that the July 25 Order is at odds with this principle in two respects. First, PSNM cites the November 1 and December 15 Orders as informing sellers that their refund liability would be no lower than the seller's marginal costs or legitimate and verifiable opportunity costs and that the Commission assured sellers that to the extent their sales prices exceeded the relevant benchmark prices, they would be able to justify the prices based upon their cost of purchased power. Second, PSNM states that, under the December 15 Order mitigation plan that took effect on January 1, 2001, the refund potential for sellers would close within 60 days of the initial report unless the Commission notified the seller otherwise. PSNM asserts that it was not identified in the March 9 Order that its transactions were subject to refund, and, therefore, with respect to its sales into the ISO and PX markets beginning January 1, 2001, PSNM was not on notice of potential refund liability.[255]

Williams asserts that the order is at odds with principles of finality and certainty that the Commission cited in prior orders in this proceeding.

Marketer Group argues that each of the various price caps, breakpoints and proxy prices in effect since October 2

255. Issues regarding 60 day refund notifications are addressed elsewhere in this order. *See supra*, section B.3.c.

created a safe harbor below which sellers were assured that their charges would not be subject to refund. It contends that, if sales both above and below the price cap were equally subject to potential refunds under the refund effective date, then the price cap would have no meaning, nor could such an interpretation be harmonized with the Commission's determination that the market rules established the filed rate. Marketer Group argues that the Commission cannot reopen rates after they have become final and that the filed rate doctrine must be strictly enforced without regard to equitable considerations. It contends that the Commission is barred from retroactively adjusting the final rates in effect to reflect its later view of equitable prices under the mitigated Market Clearing Price mechanism announced in the June 19 Order.

Commission Response

We found in the November 1 Order that the "electric market structure and market rules for wholesale sales of electric energy in California were seriously flawed and that these structures and rules, in conjunction with an imbalance of supply and demand in California, have caused, and continue to have the potential to cause, unjust and unreasonable rates for short-term energy . . . under certain conditions."[256] In the December 15 Order we reaffirmed this finding, and explained that, "[w]hile high prices in and of themselves do not make a rate unjust and unreasonable (because, for instance, underlying production prices may be high), if over time rates do not behave as expected in a

256. November 1 Order at 61,349-50; see also December 15 Order at 61,998.

competitive market, the Commission must step in to correct the situation."[257] We continued by finding that:

> independent of any conclusive showing of a specific abuse of market power, a variety of factors have converged to drastically skew wholesale prices under certain conditions: significant over-reliance on spot markets . . . ; significant increases in load combined with lack of new facilities as well as reduced availability of supply from out of state; chronic underscheduling; and lack of demand responsiveness to price. . . . [W]e have no assurance that rates will not be excessive relative to benchmarks of producer costs or competitive market prices, due to the circumstances listed above.[258] Moreover, we specifically found that an abuse of market power is not required for a determination that rates are unjust and unreasonable. Rather, whether prices are just and reasonable depends on whether those prices fall within a "zone of reasonableness."[259]

We reaffirm those findings. Our determination regarding the justness and reasonableness of the rates here is based on systemic dysfunctions in the single clearing price auction markets that resulted in those rates. We determined that structural problems, which existed in all hours, had the

257. December 15 Order at 61,998-99.

258. *Id.*

259. *Id.*

potential to cause market prices to exceed that which one would expect in a competitive market. While our solution requires review for all hours, that does not mean that this will result in refunds for all hours.

Individual seller analysis was not required to find the rates unjust and unreasonable here, particularly as a single market clearing price applied to any given sale. All sellers received the same price. These circumstances make it appropriate to analyze all sellers as a whole. While the December 15 Order devised a remedy allowing individual sellers to justify prices above the "breakpoint," the underlying problem was that the single price auction, in conjunction with other components of market structure and market rules, was no longer producing just and reasonable rates.

FPA section 206(b) explicitly permits us to order refunds of any amounts paid in excess of those which would have been allowed under the just and reasonable standard. Sellers were or should have been aware that this statutory provision governed the rates of the sales at issue here. Under the rapidly changing circumstances here, where proceedings regarding the justness and reasonableness of the rates in the PX and ISO markets were instituted in August, 2000, with a refund effective date in October 2000, the beneficial effects of rate certainty must yield to the Commission's statutory obligation to ensure that rates do not exceed the zone of reasonableness. As Commission orders are not final while subject to rehearing, and rehearing was requested of all orders in this proceeding, the mitigation measures and related procedures implemented in those orders were subject to adjustment or replacement. Sellers could not reasonably have expected

therefore, that the mitigation measures and related procedures implemented in earlier orders in this proceeding would remain unchanged during the rehearing process.

Due process has been satisfied in this case. As the voluminous record in this case illustrates, parties were provided with a full opportunity to address refunds and all other issues in this case. We fully considered all proper submissions, and this record provides sufficient discussion of the issues so that we can appropriately decide all issues in this case on the resulting record.

* * *

The Commission orders:

(A) The Commission hereby denies rehearing of the issues from the August 23 and November 1 Orders not previously acted upon.

(B) The Commission hereby denies rehearing of the Amendment No. 33 Order, as discussed in the body of this order.

(C) The Commission hereby grants rehearing of the December 15 Order with respect to the imposition of the underscheduling penalty and denies rehearing of that order in all other respects, as discussed in the body of this order.

(D) The Commission hereby dismisses as moot in part and denies in part requests for rehearing of the March 9 Order and terminates the following dockets: ER01-1444-001, ER01-1445-001, ER01-1446-001, ER01-1447-001, ER01-1448-002, ER01-1449-002, ER01-1450-001, ER01-1451-002, ER01-1452-001,

ER01-1453-001, ER01-1454-002, ER01-1455-002, and ER01-1456-002.

(E) The Commission hereby grants rehearing in part and denies rehearing in part of the June 19 Order, as discussed in the body of this order.

(F) The Commission hereby grants rehearing in part and denies rehearing in part of the July 25 Order, as discussed in the body of this order.

(G) The Commission hereby rejects the ISO's Tariff Amendment No. 38 filed in Docket No. ER01-1579-000 as moot and dismisses the requests for rehearing in Docket No. ER01-1579-001.

(H) The Commission hereby dismisses the complaint in Docket No. EL01-34-000 and EL01-34-001 as moot.

(I) The Commission hereby directs SoCal Edison to amend its market-based tariff, as discussed in the body of this order.

(J) CARE's request for administrative aid under section 319 of the Federal Power Act is hereby denied, as discussed in the body of this order.

(K) The Commission hereby directs Judge Birchman to recommence the refund hearing schedule, as discussed in the body of this order.

(L) The Commission hereby directs Judge Birchman to submit a Report and Recommendation regarding the timing for the ISO recalculation of its settlement statements by January 11, 2002, as discussed in the body of this order.

(M) The ISO is hereby directed to file by May 1, 2002 its revised congestion management proposal and a plan for implementation of a day-ahead market.

Commissioner Massey dissented in part with a separate statement attached.

* * *

William L. Massey, Commissioner, *dissenting in part*:

This order essentially "stays the course" on our market mitigation program in the Western markets. The markets have behaved reasonably since our program was put in place, and I agree with staying the course. Today's order reaffirms many excellent aspects of our program, such as providing for refunds for some past sales, requiring most sellers in the WSCC to offer all available power in spot markets during all hours, conditioning market based rate authority to prevent anticompetitive behavior, and establishing price mitigation for all hours across the WSCC until September 2002. Thus there is a lot to like in this order.

Although I agree with the great bulk of the policy calls made in this order, there are some decisions regarding the refund program from which I dissented in our July 25 order.[1] Those decisions, reaffirmed here, are exercising jurisdiction over governmental entities to require refunds, refusing to deal with the generation withholding issue by basing refund calculations on the actual past dispatch instead of using some other means such as an "assumed economic dispatch," using spot gas prices

1. *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120, at pp. 61,521-61,523 (2001).

in the refund calculation that are based on indices instead of on actual gas costs, and imposing a 10% creditworthiness adder in the refund calculations. I continue to disagree with these conclusions.

For these reasons, I must respectfully dissent in part from an otherwise excellent, comprehensive and well-written order.

APPENDIX E — ORDER ON REHEARING AND CLARIFICATION ISSUED MAY 15, 2002

FEDERAL ENERGY REGULATORY COMMISSION

99 FERC ¶ 61,160 (2002)

San Diego Gas & Electric Company, Complainant v. Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange Corporation, Respondents

Investigation of Practices of the California Independent System Operator and the California Power Exchange

Public Meeting in San Diego, California

Reliant Energy Power Generation, Inc., Dynegy Power Marketing, Inc., and Southern Energy California, L.L.C., Complainants, v. California Independent System Operator Corporation, Respondent

California Electricity Oversight Board Complainant v. All Sellers of Energy and Ancillary Services Into the Energy and Ancillary Services Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

California Municipal Utilities Association, Complainant v. All Jurisdictional Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

Californians for Renewable Energy, Inc. (CARE), Complainant v. Independent Energy Producers, Inc., and

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All Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange; All Scheduling Coordinators Acting on Behalf of the Above Sellers; California Independent System Operator Corporation; and California Power Exchange Corporation, Respondents

Puget Sound Energy, Inc., Complainant v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and /or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, Respondents

California Independent System Operator Corporation

California Independent System Operator Corporation

Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council

California Power Exchange Corporation

California Independent System Operator Corporation

California Independent System Operator Corporation

Southern California Edison Company and Pacific Gas and Electric Company

Arizona Public Service Company

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Automated Power Exchange, Inc.

Avista Energy, Inc.

California Power Exchange Corporation

Duke Energy Trading and Marketing, LLC

Dynegy Power Marketing, Inc.

Nevada Power Company

Portland General Electric Company

Public Service Company of Colorado

Reliant Energy Services, Inc.

Sempra Energy Trading Corporation

Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC

Williams Energy Services Corporation

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Docket Nos. EL00-95-053 and EL00-95-045
Docket No. EL00-98-042 and EL00-98-047
Docket No. EL00-107-008
Docket No. EL00-97-002
Docket No. EL00-104-007
Docket No. EL01-1-008
Docket No. EL01-2-002
Docket No. EL01-10-003
Docket No. ER01-607-002
Docket No. RT01-85-007
Docket No. EL01-68-009
Docket No. ER00-3461-003
Docket No. ER00-3673-002
Docket No. ER01-1579-003
Docket No. EL01-34-002
Docket No. ER01-1444-003
Docket No. ER01-1445-003
Docket No. ER01-1446-005
Docket No. ER01-1447-003
Docket No. ER01-1448-005
Docket No. ER01-1449-006
Docket No. ER01-1450-003
Docket No. ER01-1451-006
Docket No. ER01-1452-003
Docket No. ER01-1453-007
Docket No. ER01-1454-003
Docket No. ER01-1455-009
Docket No. ER01-1456-010

Appendix E

ORDER ON REHEARING AND CLARIFICATION

(Issued May 15, 2002)

Before Commissioners: Pat Wood, III, Chairman, William L. Massey, Linda Breathitt, and Nora Mead Brownell.

Introduction and Summary

In this order, the Commission acts on petitions for rehearing and clarification of an order on rehearing and clarification issued on December 19, 2001 (December 19 order).[1] The Commission denies rehearing of the December 19 order. While the order also clarifies several minor issues, the general mitigation plan set forth in previous orders remains unchanged by this order. This order brings further clarity to the operation of the Western markets, and thereby promotes just and reasonable rates in these markets.

* * *

Discussion

A. *Procedural Matters*

* * *

2. *Requests denied on procedural grounds*

* * *

Other parties have raised issues that have already been addressed on rehearing in the December 19 order, including:

1. *San Diego Gas & Electric Co., et al.*, 97 FERC ¶ 61,275 (2001).

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Metropolitan's argument that the Commission erred in requiring hydroelectric operators to provide restitutionary refunds for ISO transactions where their generation cost exceeds the MMCP (*see* December 19 order at p. 62,185); AEPCO's request for rehearing regarding governmental entities being subject to refund obligations (p. 62,182); the ISO's request for rehearing regarding the exclusion of DOE section 202(c) transactions from price mitigation procedures (p. 62,196); Modesto's request that the Commission reconsider the gas cost formula (pp. 62,203-04) and Modesto's and PUCN's arguments that mitigation measures should apply to forward contracts (pp. 62,214-15 and 62,245). These requests are hereby denied as impermissible requests for rehearing of a rehearing.

* * *

The Commission orders:

The Commission hereby denies rehearing, and grants clarification in part, of the December 19 order, as discussed in the body of this order.

By the Commission. Chairman Wood and Commissioner Brownell concurred with a separate statement attached.

* * * *

APPENDIX F –STATUTORY PROVISIONS INVOLVED SECTIONS 201, 205 AND 206 OF PART II OF THE FEDERAL POWER ACT AND SECTION 309 OF PART III OF THE FEDERAL POWER ACT, AS CODIFIED AT 16 U.S.C. §§ 824, 824d, 824e AND 825h AND IN FORCE DURING 2000-2001

16 U.S.C. § 824 (2000)

PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. (FPA SECTION 201) Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate

commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C. 79 et seq.].

16 U.S.C. § 824d (2000)

§ 824d. (FPA SECTION 205) Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

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(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such

increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Appendix F

16 U.S.C. § 824e (2000)

§ 824e. (FPA SECTION 206) Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for

the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that

(1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and

(2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Appendix F

16 U.S.C. § 825h (2000)

PART III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

* * *

§ 825h. (FPA SECTION 309) Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX G — STATUTORY PROVISIONS INVOLVED SECTIONS 201 AND 206 OF PART II OF THE FEDERAL POWER ACT, AS AMENDED BY THE ENERGY POLICY ACT OF 2005 AND CODIFIED AT 16 U.S.C. §§ 824, 824e

16 U.S.C. § 824 (2007)

PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. (FPA SECTION 201) Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is

transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

Appendix G

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Appendix G

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C.A. § 16451 et seq.].

16 U.S.C. § 824e (2007)

§ 824e. (FPA SECTION 206) Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall

determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period

commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

Appendix G

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice

to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e)(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

No. 07-155

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 16, 2007

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Pacific Gas & Electric Co. v. Bonneville Power Adminisration, No. 07-155

Dear Mr. Suter:

Attached is a corrected copy of the government's response to the petition for a writ of certiorari in this case. In the printed version filed earlier, a portion of the text on page 4 was printed in the wrong size type, and the date was printed incorrectly on page 16. This version corrects those errors; it makes no other changes.

Thank you for your attention to this matter.

Sincerely,

Paul D. Clement
Solicitor General

cc: all counsel

QUESTION PRESENTED

Whether the Federal Power Act, 16 U.S.C. 791a *et seq.*, which generally regulates only non-governmental "public utilities," and which generally exempts federal and state governmental entities from Federal Energy Regulatory Commission refund authority, authorized the Commission to order federal and state governmental entities to pay refunds on sales of electric energy in the California market during the 2000-2001 energy crisis.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 422 F.3d 908. The orders of the Federal Energy Regulatory Commission (Pet. App. 44a-74a, 75a-148a, 149a-154a) are reported at 96 F.E.R.C. ¶ 61,120, 97 F.E.R.C. ¶ 61,275, and 99 F.E.R.C. ¶ 61,160.

JURISDICTION

The judgment of the court of appeals was entered September 6, 2005. A petition for rehearing was denied on March 7, 2007 (Pet. App. 42a-43a). On May 21, 2007, Justice Kennedy extended the time within which to file

a petition for a writ of certiorari to and including July 20, 2007. On July 24, 2007, Justice Kennedy further extended the time to August 4, 2007, and the petition was filed on August 6, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To that end, the FPA provides that every "public utility" must file, "[u]nder such rules and regulations as the Commission may prescribe, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c). FERC has the statutory authority to investigate rates for sales by public utilities to determine whether they are just and reasonable. 16 U.S.C. 824e(a). After such an investigation, FERC may order a public utility to pay "refunds of any amounts paid * * * in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b).

The FPA defines a "public utility" as a "person who owns or operates facilities subject to the jurisdiction of the Commission." 16 U.S.C. 824(e). The term "person," in turn, is defined as an "individual or a corporation," 16 U.S.C. 796(4), and the statutory definition of "corporation" specifically excludes "municipalities," see *ibid.*,

which include any "city, county, * * * or other political subdivision or agency of a State," 16 U.S.C. 796(7). Thus, utilities operated by states and localities, although "public" in the sense of governmental, are not "public utilities" under the FPA.

The scope of FERC's regulatory authority is further limited by 16 U.S.C. 824(f). That provision states that "[n]o provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, * * * unless such provision makes specific reference thereto."

b. The Bonneville Power Administration (BPA) is a federal agency within the Department of Energy. See 16 U.S.C. 832a(a). It was created by Congress in 1937 to market hydroelectric power generated by dams on the Columbia River and its tributaries. BPA is a self-financing agency that funds its programs through its own revenues, with congressional oversight. See 16 U.S.C. 838i. The rates at which BPA sells power are governed by the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), Pub. L. No. 96-501, 94 Stat. 2697 (16 U.S.C. 839 *et seq.*). Under that statute, rates are established through trial-type hearings conducted by BPA. See 16 U.S.C. 839e(e). BPA's primary obligation in setting rates is to meet its revenue requirements, consistent with sound business principles. See 16 U.S.C. 839e(a)(1).

The Northwest Power Act grants FERC a specific and limited role in reviewing BPA's rates. FERC is required to approve rates set by BPA under 16 U.S.C. 839e if they (A) are sufficient to assure repayment of the federal investment in the Columbia River power system,

(B) are based on total system costs, and (C) as to transmission rates, equitably allocate the costs of the transmission system between federal and non-federal power utilizing such system. See 16 U.S.C. 839e(a)(2). Nothing in the Act authorizes FERC to conduct any inquiry into BPA's rates under a standard of "reasonableness."[1]

c. After the events giving rise to this case, Congress enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Section 1286 of that statute amends 16 U.S.C. 824e (2000 & Supp. V 2005) to provide that "[i]f an entity described in [16 U.S.C. 824(f) (Supp. V 2005)] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission." Energy Policy Act of 2005 § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)(2) (Supp. V 2005)).[2]

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[1] BPA is, however, subject to FERC orders under a provision of the FPA allowing FERC to issue orders requiring a "transmitting utility" to provide transmission services. 16 U.S.C. 824j; see 16 U.S.C. 796(23) (defining a "transmitting utility" as any "electric utility * * * or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale"). Governmental entities like BPA are also subject to FERC's authority to order transmission interconnections. See 16 U.S.C. 824i.

[2] That new regulatory authority applies only to governmental entities that sell more than "8,000,000 megawatt hours of electricity per year" and does not extend to sales by "an electric cooperative." 16 U.S.C. 824e(e)(3)(A) and (B) (Supp. V 2005).

Several other provisions added to the FPA by the Energy Policy Act of 2005 are also applicable to governmental entities. See, *e.g.*, Energy Policy Act of 2005 § 1283, 119 Stat. 979 (16 U.S.C. 824v (Supp. V 2005))

The Energy Policy Act of 2005 separately addressed sales by BPA by restricting the Commission's new refund authority over governmental entities. Specifically, Section 1286 amended 16 U.S.C. 824e (2000 & Supp. V 2005) to provide that "[t]he Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate." 16 U.S.C. 824e(e)(4)(A) (Supp. V 2005). The refund authority over BPA is further constrained by new 16 U.S.C. 824e(e)(4)(B) (Supp. V 2005), which allows the Commission to order refunds for short-term sales by BPA only if the rates "are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period." Finally, the Energy Policy Act of 2005 added a new 16 U.S.C. 824e(e)(4)(C) to clarify the scope of the Commission's authority over federal power marketing agencies, of which BPA is one. That provision states that "[i]n the case of any Federal power marketing agency * * * the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate." Energy Policy Act

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(allowing FERC to prohibit "any entity (including an entity described in [16 U.S.C. 824(f)])" from engaging in market manipulation in connection with jurisdictional transactions); Energy Policy Act of 2005 § 1231, 119 Stat. 955 (16 U.S.C. 824j-1 (Supp. V 2005)) (concerning open access by "unregulated transmitting utilit[ies]"); Energy Policy Act of 2005 § 1211, 119 Stat. 942 (16 U.S.C. 824*o*(b) (Supp. V 2005)) (concerning reliability standards for any user, owner or operator of the bulk power system, "including but not limited to the entities described in" 16 U.S.C. 824(f) (Supp. V 2005)).

of 2005 § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)(4)(C) (Supp. V 2005)).

2. In the 1990s, California extensively deregulated portions of its energy market. At that time, the major utilities were vertically integrated; that is, they owned generating resources, transmission lines, and distribution facilities. Under the restructuring, those utilities were required to divest most of their generating assets and to purchase power at market-based rates through an independent power exchange, which organized the wholesale market, and an independent system operator, which managed the transmission network. Pet. App. 7a. The restructuring contemplated sales of power into a centralized "spot" market in which sellers, including public utilities and governmental utilities alike, would bid in a "single-price auction." *Id.* at 8a. In that auction, all buyers paid the same price as was bid by the highest-priced seller that was needed to allow the market to clear, that is, to ensure that supply was sufficient to meet the demand. *Ibid.*

For several years, the restructured California electricity markets operated largely as intended. Starting in the summer of 2000, however, wholesale electricity prices in California increased significantly; utilities incurred billions of dollars in debt; and the independent system operator declared dozens of system emergencies and occasional rolling blackouts. See generally *In re California Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001).

On August 2, 2000, San Diego Gas and Electric Co., a public utility in California, filed a complaint with FERC in which it sought a price cap on sales by public utility sellers. *San Diego Gas & Elec.*, 92 F.E.R.C. ¶ 61,172, at 61,603 (2000). In response, FERC instituted an inves-

tigation and, in December 2000, terminated the power exchange wholesale price schedule. Thereafter, FERC established for public utilities a "breakpoint" price above which refunds would be either required or investigated. Pet. App. 10a. In that order, FERC stated that it had "no authority" to order non-public utilities, that is, governmental entities, to make refunds. *Id.* at 11a (quoting *San Diego Gas & Elec.*, 94 F.E.R.C. ¶ 61,245, at 61,864 (2001)).

In an order issued on July 25, 2001, the Commission took a different position. Pet. App. 44a-74a. In that order, FERC held for the first time that it had jurisdiction to order refunds on sales in the California spot markets during the relevant time period, whether by public utilities or by non-public utilities, including governmental entities. *Id.* at 59a. The Commission stated that "although we do not have direct regulatory rate authority over power sales by non-public utilities, we do have authority to order them to abide by the market rules we have established and to make refunds of unjust and unreasonable rates for sales pursuant to those market rules." *Id.* at 60a. In the Commission's view, it had jurisdiction because of "the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants." *Id.* at 63a.

3. Governmental entities, including BPA, sought review, and the cases were consolidated in the Ninth Circuit. Pet. App. 9a n.3. The court of appeals granted the petitions for review. *Id.* at 1a-41a.

The court of appeals held that "FERC does not have refund authority over wholesale electric energy sales

made by governmental entities and non-public utilities." Pet. App. 5a. It based that conclusion on its reading of the "unambiguous" statutory text. *Ibid.* In particular, the court emphasized that Section 824(f) "provides that governmental entities are not subject to the provisions of subchapter II of the FPA." *Id.* at 15a. While acknowledging that FERC has "broad powers over wholesale sales of electric energy" under Section 824(b)(1), the court explained that "the specific prevails over the general." *Id.* at 18a. The court also looked to Sections 824d and 824e, noting that FERC's jurisdiction under those provisions was confined to sales by "public utilities," a term that was expressly defined to exclude municipalities. *Id.* at 19a-23a. Focusing on those provisions, the court thus rejected the argument that FERC's general jurisdiction over the wholesale sale of power into California justified the exercise of refund authority over governmental entities, holding that the "more *specific* provisions of the FPA * * * limit FERC's authority over governmental entities and limit FERC's authority to ensure just and reasonable rates and to order refunds to 'public utilities.'" *Id.* at 26a (citation omitted).

The court of appeals determined that its conclusion was supported by the legislative history of the FPA, Pet. App. 26a-28a, as well as by FERC's longstanding practice of excluding governmental entities from its FPA jurisdiction, *id.* at 29a-32a. The court also rejected the argument that the governmental entities had waived the restrictions on FERC's jurisdiction by selling power in a market regulated by FERC. As the court explained, "FERC cannot exercise jurisdiction or authority unless authorized by statute, regardless of whether the juris-

diction is exercised without objection or even with the consent of the relevant parties." *Id.* at 35a.[3]

ARGUMENT

The court of appeals correctly determined that FERC, at the time of the issuance of its refund orders, lacked refund jurisdiction over non-public utility, governmental entities. The court's judgment follows from the plain language of 16 U.S.C. 824 and 824e, and it does not conflict with any decision of this Court or of any other court of appeals. Moreover, in light of the amendments made by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, the interpretation of the Federal Power Act as it existed in 2001 is an issue of minimal ongoing importance. Further review is not warranted.

1. The decision below comports with the plain language of the Federal Power Act, 16 U.S.C. 791a *et seq.* Petitioner does not claim that the court of appeals miscontrued the statutory language, and petitioner asserts no conflict among the circuits with respect to the interpretation of that language. Indeed, the D.C. Circuit recently adopted a construction of the FPA identical to that applied below. In *Transmission Agency of Northern California* v. *FERC*, 495 F.3d 663 (2007) (*TANC*), the court followed the Ninth Circuit's decision in holding that FERC had no authority under 16 U.S.C. 824(f) and 824e to order a municipality to pay refunds under the Federal Power Act. See 495 F.3d at 673-675. Like the

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[3] On remand, FERC implemented the decision of the court of appeals by vacating its "refund orders to the extent that they subject non-public utility entities to the Commissions's [Section 824e] refund authority." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, 121 F.E.R.C. ¶ 61,067, ¶ 2 (2007).

court below, the D.C. Circuit held that it did not matter whether the municipality had contractually agreed to pay such refunds since, "as a statutory entity, [FERC] cannot acquire jurisdiction merely by agreement of the parties before it." *Id.* at 676 (brackets in original) (quoting *Columbia Gas Transmission Corp.* v. *FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005)); accord Pet. App. 35a ("FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or out of FERC's jurisdiction.").

The conclusion reached by the courts in this case and *TANC* is confirmed by Congress's enactment of the Energy Policy Act of 2005. That legislation amended 16 U.S.C. 824e (Supp. V 2005) to specify limited circumstances in which FERC may order BPA and other governmental entities to pay refunds on sales of electric energy.[4] As the court of appeals recognized, the amendments were necessary precisely because Congress recognized that the "existing law"—at issue here—"did not permit FERC to order refunds from governmental entities." Pet. App. 29a n.10.

Petitioner contends (Pet. 29-30) that the 2005 legislation "did not resolve the uncertainty engendered by the Ninth Circuit's ruling." In fact, the import of the 2005 amendments is clear. Section 824(f) bars FERC from exercising jurisdiction over sales of electric energy by governmental entities under any provision of subchapter II of the FPA "unless such provision makes specific reference thereto." The Energy Policy Act of 2005 satisfies the "unless" clause by adding 16 U.S.C. 824e(e) (Supp.

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[4] Petitioner does not contend that the 2005 legislation applies retroactively. Since the statute does not otherwise specify, the amendments apply prospectively only. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994).

V 2005), thus making clear that FERC's refund jurisdiction over sales of electric energy by governmental entities is limited to the circumstances set forth in that new provision. And the provisions of the Energy Policy Act of 2005 relating to BPA—which petitioner does not address—are even more explicit. See 16 U.S.C. 824e(e)(4) (Supp. V 2005). There is nothing "uncertain" about the effect of the 2005 amendments. In any event, the interpretation of those amendments would most appropriately be addressed in a case that arose after they became effective and that actually presented the issue.[5]

2. Petitioner contends (Pet. 15) that the jurisdictional limitations of Sections 824 and 824e may be disregarded because an agency may address matters outside its jurisdiction "where necessary to fulfill its overarching obligation to ensure that rates within its jurisdiction are just and reasonable." In support of that proposition, petitioner cites *Houston East & West Texas Railway* v. *United States*, 234 U.S. 342 (1914) (*Houston*), in which this Court upheld the regulatory jurisdiction of the Interstate Commerce Commission (ICC) over allegedly discriminatory interstate transportation rates, even though the remedy ultimately affected intrastate rates that were beyond the ICC's jurisdiction. Pet. 17.

Petitioner's reliance on *Houston* is misplaced. In that case, the Court sustained an ICC order that exercised the agency's jurisdiction over *interstate* rates, which were indisputably within the agency's statutory jurisdiction. See 234 U.S. at 349-350. The ICC did not purport to regulate any *intrastate* rates directly, and this Court noted that the intrastate rate was not af-

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[5] In view of the enactment of the Energy Policy Act of 2005, FERC accepts the constructions of Sections 824(f) and 824e adopted by the court of appeals below and by the D.C. Circuit in *TANC*.

fected by the ICC's order. See *id.* at 347. *Houston* stands for the unexceptional proposition that a regulatory agency may consider matters outside its jurisdiction in determining how to exercise its authority over matters within its jurisdiction, as long as the agency does not directly regulate the matters outside its jurisdiction.

The other decisions cited by petitioner (Pet. 19-21) merely apply that principle to sustain agency action regulating a matter falling within the agency's jurisdiction. None of the decisions cited by petitioner holds that a regulatory agency may disregard a jurisdictional restriction in order to regulate directly a matter over which Congress has expressly denied the agency regulatory power.[6] To the contrary, this Court has expressly rejected any such rule. In *FPC* v. *Conway Corp.*, 426 U.S. 271, 276-282 (1976), for example, the Court held that the Federal Power Commission had authority to eliminate discrimination barred by Section 824e by establishing a rate within a broad range of possible reasonable rates. In so holding, however, the Court was careful to note that this remedy did "not invade a nonjurisdictional area" because "[t]he remedy, if any,

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[6] Petitioner suggests (Pet. 19) that 16 U.S.C. 825h, which confers a general power on FERC to take such actions and issue orders necessary to carry out the FPA, might allow FERC to exercise jurisdiction otherwise barred by Section 824e. That contention is foreclosed by *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 394 (1974), in which this Court held that the Federal Power Commission could not use its analogous authority under Section 16 of the Natural Gas Act (NGA), 15 U.S.C. 717o, to "set at naught an explicit provision of the Act." The same principle governs the Commission's authority under Section 825h. See *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 n.7 (1981) (noting that the NGA and the FPA are "in all material respects substantially identical") (quoting *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

would operate only against the rate for jurisdictional sales." *Id.* at 279. The question in this case, in contrast, is whether FERC may impose a refund remedy directly on governmental entities, in conflict with Section 824(f).

Petitioner's reliance (Pet. 18) on *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953), is also misplaced. The FPA gives FERC jurisdiction over sales of electricity at wholesale in interstate commerce, and it defines the "sale of electric energy at wholesale" as the "sale of electric energy to any person for resale." 16 U.S.C. 824(d). The public utility in *Public Utilities Commission* argued that sales to the United States Navy were exempt from FERC regulation under the FPA because the Navy was not a "person" within the meaning of Section 824(d) and thus was not entitled to seek relief from the Commission. The Court rejected that contention, holding that Congress placed no significance on the use of "person" in that context and therefore that the Navy could claim the protections of the FPA. *Public Utils. Comm'n*, 345 U.S. at 313. That holding has no bearing on the issues presented here. Section 824(f) prohibits FERC from exercising refund authority over governmental entities; it does not bar the Commission from affording such governmental entities the protections of the Act. Cf. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 316 n.15 (1978) ("[T]he sovereign [is] entitled to have the benefit of a statute extending a right to 'persons.'")

3. Petitioner asserts (Pet. 23) that the decision below "conflicts with Supreme Court precedent requiring deference to the regulatory agency when interpreting the scope of its authority under its governing statutes." But the appropriate framework for reviewing an agency's interpretation of a statute is that established

by *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984), and that is precisely the framework applied by the court of appeals in this case, Pet App. 13a, and by the D.C. Circuit in *TANC*, 495 F.3d at 673-674. Both courts held that the *Chevron* analysis stopped at step one because the statute was unambiguous. Pet. App. 5a ("The text is clear and unambiguous."); *TANC*, 495 F.3d at 673 ("In this case, we need go no further than step one of *Chevron* to hold that FERC acted contrary to law when it ordered [the City of Vernon, California] to pay refunds.").

The decision below is entirely consistent with the cases cited by petitioner on the question of deference. See Pet. 23-24. In two of those cases, as in this case, the Court found the statutory language to be unambiguous, making it unnecessary to defer to FERC's interpretation. See *Mobil Oil Exploration & Producing Se., Inc.* v. *FERC*, 498 U.S. 211, 225 n.5 (1991); *New York* v. *FERC*, 535 U.S. 1, 16-22 (2002). And the D.C. Circuit's decision in *Automated Power Exch., Inc.* v. *FERC*, 204 F.3d 1144 (2000) (*APX*), cited by petitioner as a "particularly relevant example" (Pet. 23), actually supports the approach followed by the court of appeals in this case. The issue in *APX* was whether FERC had jurisdiction over an entity that facilitated trades of power but neither took title to the power nor transmitted it in interstate commerce. The court held that FERC had such jurisdiction because the entity was a public utility, reasoning that FERC precedent "does not limit public utilities to those entities that take title to power." *APX*, 204 F.3d at 1151. As the court explained, APX "can set the final price at which the sale is actually transacted," which is "precisely" the "feature" that made APX a

"public utility" subject to FERC jurisdiction. *Id.* at 1150.

The issue in *APX* was thus not the broad legal question whether FERC could assert jurisdiction over a non-public utility, but rather the case-specific question whether APX *was* a public utility. Petitioner in this case does not contend that governmental entities are public utilities. Certainly, the approach followed in *APX* is in accord with the approach followed by the court of appeals in this case and by the D.C. Circuit in *TANC*. Both courts ruled that there was no ambiguity on the question presented here because there were abundant indicia in the express language of Section 824(f) and in Section 824e that Congress did address the precise question at hand and had decided not to accord FERC refund jurisdiction over governmental entities. Nothing in the holding or reasoning of *APX* is inconsistent with those rulings.

4. Finally, petitioner argues (Pet. 25-26) that the case presents "an issue of national importance" because it involves "the single biggest energy market crisis in the nation's history" and will "have ramifications well into the future for this country's energy policy and for the goals that Congress sought to achieve with the FPA." But with the enactment of the Energy Policy Act of 2005, Congress has already responded to the California energy crisis, established policy "goals," and addressed the regulatory "ramifications" associated with centralized markets. Congress elected to expand FERC's refund jurisdiction over governmental entities with respect to energy sales in centralized markets only to the extent set forth in Section 1286 of the Energy Policy Act of 2005, and not otherwise. 16 U.S.C. 824e (Supp. V 2005).

It is up to Congress to specify the scope of FERC's power under the Federal Power Act. The text of Sections 824(f) and 824e, as well as the text of the Energy Policy Act of 2005 and the policy determinations embodied in that legislation, foreclose petitioner's contentions in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2007

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-155

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, ET AL,
Respondents.

On Petition for a Writ of Certiorari
to the
United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Following the express language of § 201(f) of the Federal Power Act that absent a "specific reference" to a governmental entity, "[n]o provision" of Part II of the Act is to "apply [directly or indirectly] ... [to] the United States, a State or any political subdivision of a State," and consistent with this Court's decisions in *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), did the Ninth Circuit correctly rule that the Federal Energy Regulatory Commission ("FERC") was without jurisdiction either to regulate, or to order refunds against, sales of electricity at wholesale by governmental entities?

CORPORATE DISCLOSURE STATEMENT

The California Cities of Anaheim, Azusa, Banning, Burbank, Colton, Glendale, Pasadena, Palo Alto, Redding, Riverside, Santa Clara, The Metropolitan Water District of Southern California/State Water Contractors, M-S-R Public Power Agency, Modesto Irrigation District, Northern California Power Agency, Public Utility Dist. No. 2 of Grant County, Sacramento Municipal Utility District, Los Angeles Department of Water and Power, the Transmission Agency of Northern California and Turlock Irrigation District, are governmental entities and do not issue stock, so they are not subject to the corporate disclosure statement requirement of Court Rule 29.6. Arizona Electric Power Cooperative, Inc., is a nonprofit Arizona rural electric generation and transmission cooperative that has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in it. The State Water Contractors is a non-profit mutual benefit corporation, representing 27 of 29 public agencies that purchase water from the California State Water Project. It issues no stock, has no corporate parent, and no publicly held company has a 10% or greater ownership interest in it.

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INTRODUCTION AND STATEMENT OF THE CASE

In the decision at issue here, construing the then applicable language of the Federal Power Act ("FPA"), the court of appeals held that "FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities." Pet. App. 5a. The court of appeals derived this unexceptional holding "from a straightforward analysis of the statute." *Id.* At all times relevant to the 2000-2001 time period at issue, the law was clear: Congress expressly denied FERC any power to order governmental sellers to pay refunds under FPA § 206, 16 U.S.C. § 824e. Every court that had considered the issue, including this Court, uniformly recognized that Congress had barred FERC (and its predecessor, the Federal Power Commission) from regulating governmental sales of electricity.

Following the Western electric market disorders of 2000 and 2001 that gave rise to the proceedings below, Congress changed the scope of FERC's refund authority. In §1286 of the Energy Policy Act of 2005 ("EPAct")[1] Congress added to FPA § 206 a new subsection (e) that prospectively granted FERC authority to order certain large governmental sellers of electricity to pay refunds upon making specified findings concerning such utilities' short term sales in centralized markets. Section 206(e) now subjects such non-federal governmental utilities to refunds only if they violate the centralized market tariffs or applicable Commission rules. It expressly provides that the federal power marketing

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[1] Energy Policy Act of 2005 ("EPAct"), Pub. L. 109-58, § 1286, 119 Stat. 594, 981 (2005) (to be codified at 16 U.S.C. § 824e).

agencies[2] and the Tennessee Valley Authority are not subject to FERC regulation except refund orders "to achieve a just and reasonable rate."[3] It subjects the Bonneville Power Administration to refunds only under a standard of just and reasonable rates measured by short term sales in the same geographic market in approximately the same period.[4] Both before and after the passage of EPAct, Congress carefully and specifically defined the reach of FERC's refund jurisdiction over governmental utilities.

This case provides no basis for the Court to address the state of FERC's current refund authority concerning governmental sales of electricity into centralized markets. The court of appeals's decision, and the underlying FERC decisions, involve FPA § 206 as it stood pre-EPAct, not as it stands now. While the Governmental Respondents believe that FERC's post-EPAct refund authority against governmental entities is strictly circumscribed by the newly-added language of FPA §§ 206(e)(2) to 206(e)(4), the reach and import of these provisions, and the expanded scope of FERC's refund authority, have yet to be addressed by the Commission or courts of appeal.

The decision of the court of appeals below is of continuing significance to the parties. However, as FERC itself has noted, the perfect storm of circumstances that gave rise to the California market disturbances in 2000-2001 and the resulting regulatory process that led up to the court's

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[2] The federal power marketing agencies are Bonneville Power Administration, Southeastern Power Administration, Southwestern Power Administration, and Western Power Administration.

[3] EPAct § 1286(4)(C).

[4] *Id.*

decision are not likely to be repeated.[5] FERC has instituted a number of regulatory reforms in wholesale power markets specifically designed to prevent the kind of price volatility and market collapse that occurred more than six years ago in California.[6]

Petitioner's claims of decisional conflict are meritless. In its decision, and in its order denying panel and *en banc* rehearing, the court of appeals correctly rejected Petitioner's contention that adherence to the plain meaning of FPA § 201(f) is in conflict with rulings in other circuits. The District of Columbia Circuit has recently and expressly "agree[d] with the *BPA*" decision at issue here.[7] It found no conflict between the appellate decisions Petitioner cites here and the core appellate holding below: *i.e.*, that FERC lacks general refund authority against governmental entities under §§ 205 and 206 of the FPA. Further, Petitioner now claims conflicts with some seven decisions of this Court, none of which was raised in its petition for rehearing and rehearing *en banc*.[8] Those cases, including a 1914 railroad decision under the Interstate Commerce Act, are, in any event, inapposite.

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[5] *Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, P 30 (2007) (delineating the multiple factors that combined "to place California and the entire West in an electricity crisis that had never before been experienced").

[6] Brief for the Federal Energy Regulatory Commission In Opposition, *Sempra Generation v. Pub. Utils. Comm'n of Cal.*, No. 06-1454 *et al.*, 14-16 (U.S. Aug. 6, 2007).

[7] *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 674 (D.C. Cir. 2007) ("*TANC*"). *See also id.* 495 F.3d at 676.

[8] California Parties' Petition for Panel Rehearing and Rehearing En Banc, *Bonneville Power Admin. v. FERC*, No. 02-70262 (9th Cir. Nov. 13, 2006).

At bottom, Petitioner's quarrel is with Congress, not the decision below. That decision correctly held that "the text and structure of the FPA are unambiguous: ... FERC's authority to order refunds under § 206(b) is specifically limited to 'public utilities' [*i.e.*, non-governmental entities] and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f)." Pet. App. 26a. The court's finding is fully consistent with the pronouncements of this Court. In *United States v. Public Utilities Commission*, 345 U.S. 295, 313 n.23 (1953), this Court held that "the exclusion of producing municipalities from Commission jurisdiction was intended." In *FPC v. Southern California Edison Co.*, 376 U.S. 205, 219 n.10 (1964), the Court similarly stated that "Section 201(f) of the Federal Power Act exempts the [Interior] Secretary's sale of energy from FPC jurisdiction."

None of the Rule 10 considerations warranting *certiorari* is present here, and the petition should be denied.

A. The Statutory Scheme

1. The FPA Pre-EPAct

FERC is a "creature of statute" and has "*only* those authorities conferred upon it by Congress." *Nat'l Ass'n of Regulatory Util. Commr's v. FERC*, 475 F.3d 1277, 1286 (D.C. Cir. 2007) (Sentelle, C.J. dissenting). *See also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it"). FERC derives its authority from the FPA.

This case involves claims for refunds under § 206 of the FPA, which is contained in Part II of the Act. Congress enacted Part II of the FPA in 1935. *New York v. FERC*, 535 U.S. 1, 6 n.3 (2002). Under Part II Congress granted the Commission "jurisdiction [over] 'the transmission of electric

energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *Id.* at 6-7 (quoting FPA § 201(b), 16 U.S.C. § 824(b)).[9] But as to governmental sellers of electricity, FPA § 201(f), 16 U.S.C. § 824(f), provided, that, absent a "specific reference" to a governmental entity, "[n]o provision" of Part II of the Act is to "apply to, or be deemed to include" governmental entities "directly or indirectly" or "any officer, agent, [or] employee" of a governmental entity acting in his or her official capacity.

The pre-EPAct text of § 201(f), which prohibited FERC during the period at issue from ordering refunds against governmental entities states:

> (f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt
>
> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, ... or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, *unless such provision makes specific reference thereto.*

Pet. App. 15a (quoting statute and adding emphasis).

FERC "derives its refund authority from subchapter [Part] II of the FPA," and in particular §§ 205 and 206, *i.e.*,

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[9] In § 402(a)(1)(B) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 583 (1977) (codified at 42 U.S.C. § 7172(a)(1)(B)), the functions of the former Federal Power Commission under Part II of the FPA were transferred to the FERC.

16 U.S.C. §§ 824d & 824e. Pet. App. 14a. Sections 205 and 206 empower FERC to regulate the wholesale and interstate transmission rates of "any public utility," but as Petitioner notes, the "definition of 'public utility' does not include municipalities and other governmental entities." Pet. 5. Petitioner acknowledges that the statutory "[§ 201(f)] exemption," "obviously means that when a municipality makes a bilateral sale of electrical power to a buyer, FERC does not regulate the price." Pet. 6.

Petitioner's multiple references to FPA § 309 are inapt. Pet. 5, 7, 19, 22 & 29. That section is not mentioned in the decision of the court of appeals nor is that the basis of the FERC orders, and in any event, is no more than a limited ancillary grant of authority to enforce substantive provisions in Part II when they are specifically applicable.

2. The FPA Post-EPAct

The regulatory framework that prevails under the FPA today is different from that which prevailed in 2000-2001. Well after the refund orders that are the subject of the court of appeals decision at issue here, Congress took up the issue of FPA reform. Congress amended § 201(f) to codify, expressly, FERC's long-standing doctrine excluding most rural electric cooperative utilities from its public utility jurisdiction.[10] Congress also enacted new FPA § 222[11] making it "unlawful for any entity (including an entity described in section 201(f))" to engage thereafter in electric

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[10] EPAct § 1291 (to be codified at 16 U.S.C. § 824(f)) (No provision in this Subchapter shall apply to "an electric cooperative that receives financing under the Rural Electrification Act of 1936 ... or that sells less than 4,000,000 megawatt hours of electricity per year"). *See* Pet. App. 20a (discussing *Dairyland Power Coop.*, 37 F.P.C. 12 (1967)).

[11] EPAct § 1283 (to be codified at 16 U.S.C. § 824v).

energy market manipulation and expanded FERC's civil penalty authority for intentional violations of Part II of the FPA.[12]

In the development of EPAct, Congress also considered and rejected proposals to expand FERC's refund authority to cover all sales into centralized markets. The CEO of Southern Company, for example, urged Congress that "sound public policy to protect consumers would mean putting all utilities participating in interstate wholesale electricity markets under FERC's full 'just and reasonable' requirements."[13] The President of the Edison Electric Institute also argued that "retail electricity consumers would be much better protected by making all electricity suppliers, not just shareholder-owned utilities, subject to FERC refund authority."[14] Congress struck a different balance. As Petitioner itself explains, Congress:

> amended FPA Section 206 to add new section 206(e)(2)-206(e)(4) allowing FERC to order refunds from certain very large municipalities in certain limited circumstances: short-term sales through centralized markets by those few municipalities that sell 8,000,000 megawatt hours or more of electricity per year, where

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[12] EPAct § 1284 (to be codified at 16 U.S.C. § 825o-1).

[13] *Electricity Proposals and Electric Transmission and Reliability Enhancement Act of 2003. Hearing before the S. Comm. on Energy and Natural Resources*, 108th Cong. 78, S. Hr'g No. 108-67 (2003) (statement of H. Allen Franklin, Chairman, President & CEO, Southern Company).

[14] The *Energy Policy Act of 2005: Hearings before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, House of Representatives, 109th Cong. 135, H.R. Ser. 109-1 (2005) (statement of Thomas Kuhn, President, Edison Electric Institute).

the sale violates the terms of the applicable tariff.

Pet. 29-30.

B. The Decisions Below

In proceedings on a complaint under FPA § 206, on March 9, 2001, FERC ordered public utility sellers to make refunds for certain sales in the California centralized markets. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services into Markets Operated by the Cal. Ind. Sys. Op. & the Cal. Power Exchange*, 94 F.E.R.C. ¶ 61,245 (2001). FERC also held in that order that it "ha[d] no authority to order [governmental] sellers to make refunds." *Id.* at 61,864.

On July 25, 2001, FERC reversed itself and held, for the first time in its history and contrary to its uniform prior pronouncements,[15] that Congress had granted it authority to

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[15] *See, e.g., Pub. Serv. Co. of Okla.*, 25 F.P.C. 656, 658 (1961) ("instrumentality of the State of Oklahoma ... is not subject to the rate regulatory jurisdiction of this Commission"); *Sacramento Municipal Utility Dist. v. Pacific Gas and Elec. Co.*, 37 F.E.R.C. ¶ 61,323, at 61,942 (1986) ("section 201(f) exempts SMUD's rates from Commission regulation"); *Pacific Water & Power, Inc. v. State of California*, 51 F.E.R.C. ¶ 61,080, at 61,180 (1990) ("instrumentalities of California ... are exempt from our rate jurisdiction under sections 205 and 206 of the Federal Power Act"); *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,495, at 62,713 (1991) ("we cannot assert jurisdiction over nonpublic utility members" of the power pool); *New West Energy Corp.*, 83 F.E.R.C. ¶ 61,004, at 61,018 (1998) ("Congress was deliberate and careful in its efforts not to impose FPA public utility regulation on states and municipalities"); *Mid-Continent Area Power Pool*, 89 F.E.R.C. ¶ 61,135, at 61,387 (1999) (refund order does not apply to state operated utility); *Mid-Continent Area Power Pool*, 91 F.E.R.C. ¶ 61,353, at 62,182 (2000)

order refunds from "non-public utility" sellers. Pet. App. 60a. According to the Commission, such refund authority derived from the transaction, not the identity of the sellers: "Commission jurisdiction attaches to ... wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse." Pet. App. 63a. It reaffirmed this position in its order denying rehearing. Pet. App. 117a-118a.

On review, the court of appeals rejected FERC's transactional analysis.

> FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC's authority over governmental entities, *see* § 201(f), and limit FERC's authority to ensure just and reasonable rates and to order refunds to 'public utilities,' *see* §§ 205, 206(b).

Pet. App. 26a (original emphasis). The court of appeals denied rehearing and rehearing *en banc* in a substantive order and explicitly rejected Petitioner's claim of a conflict with decisions of the District of Columbia Circuit.[16]

In a remand order issued October 19, 2007, FERC implemented the decision of the court of appeals in this case

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("[FERC] cannot enforce the refund requirement against Nebraska District").

[16] The District of Columbia Circuit "did not say, or even imply, that FERC may assert jurisdiction over a non-jurisdictional entity for purposes of ordering a refund." Pet. App. 43a.

and vacated its "refund orders to the extent that they subject non-public utility entities to the Commission's FPA section 206 refund authority." *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Services Into Markets Operated by the California Independent System Operator & the California Power Exchange*, 121 F.E.R.C. ¶ 61,067, P 2 (2007), *reh'g pending*.

ARGUMENT

I. Petitioner's Argument that the Ninth Circuit Ignored This Court's Precedent by Failing to Give Deference to FERC's Interpretation of the Scope of its Authority Does Not Merit Review By This Court.

Without claiming any ambiguity in the statute, and incredibly, without even citing *Chevron*,[17] Petitioner argues that the Ninth Circuit ignored this Court's precedent in failing to give FERC deference in interpreting the scope of its authority. Pet. 23.[18] *Chevron* establishes the familiar two-pronged test for determining when deference is due to an agency's interpretation of the statutes it administers. Under the first, the court ascertains whether the statute is unambiguous. *Chevron*, 467 U.S. at 842-43. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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[17] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[18] The only case cited by Petitioner suggesting a statutory ambiguity, *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000), addressed the question of whether an independent power exchange, a type of entity not in existence in 1935 at the time Part II of the FPA was enacted, could be regulated as a public utility. Pet. 24, *citing* 204 F.3d at 1150. Municipal utilities did exist in 1935 and have always been recognized as not being public utilities within the meaning of the FPA.

expressed intent of Congress." *Id.* It is only in cases of statutory ambiguity that questions of agency deference arise.

This was precisely the analysis performed by the Ninth Circuit. Pet. App. 13a-28a. Construing § 201(f) of the Act, which expressly excludes federal and state governmental utilities from FERC's rate jurisdiction, together with §§ 205 and 206, which limit FERC's rate jurisdiction solely to "public utilities" – a universe from which governmental utilities are also expressly excluded – the Ninth Circuit found that the "text is clear and unambiguous." Pet. App. 5a. "We conclude," it stated, "that FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities." *Id.* The District of Columbia Circuit reached an identical conclusion in July. *TANC*, 495 F.3d at 674.[19]

This Court has reached the very same conclusion. "[T]he exclusion of producing municipalities from Commission jurisdiction was intended." *Public Util. Comm'n*, 345 U.S. at 313 n.23.[20] "Section 201(f) of the [FPA] exempts the

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[19] Petitioner had earlier argued to this Court in its May 17, 2007, motion for extension of time to file a petition for writ of certiorari that the District of Columbia Circuit's precedent was in direct conflict with the Ninth Circuit's opinion. Motion at 4. But as it concedes in its petition, the District of Columbia Circuit's opinion in *TANC* directly rejects that argument. Pet. 21-22. Curiously, Petitioner then cites the District of Columbia Circuit's ruling in *United Distribution Cos. v. FERC*, 88 F. 3d 1105 (D.C. Cir. 1996) in support of its petition (Pet. 23), even though the *TANC* opinion directly rejects the relevance of that case. *TANC*, 495 F.3d at 675 n.9.

[20] *Public Utilities Commission* also held that sales of electricity at wholesale to municipalities from jurisdictional public utilities were subject to the full scheme of regulation and remedies in Part II of the FPA. *Public Utilities Comm'n*, 345 U.S. at 312-16.

[Interior] Secretary's sale of energy from FPC jurisdiction." *Southern California Edison Co.*, 376 U.S. at 219 n.10. The Court's interpretations of the FPA in *Public Utilities Commission* and *Southern California Edison* render *Chevron* deference inapplicable to FERC's revisionist attempt to assert refund authority over governmental entities. As the Court stated in *Neal v. United States*, 516 U.S. 284, 295 (1996):

> In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.

See also Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) (same).

II. Petitioner's Arguments concerning FERC's Authority Under Section 309 of the FPA Do Not Merit Review.

Petitioner seeks to evade the § 201(f) exclusion by stating that it applies only to Part II of the FPA, whereas § 309, which "giv[es] FERC authority to perform such acts and make such orders as necessary to carry out the Act is in Part III of the FPA ... and is therefore not subject to the Section 201(f) exclusion." Pet. 7. FERC's order cannot be upheld on a statutory basis the agency did not assert. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). FERC's orders below did not assert that Section 309 gave it ancillary authority to regulate entities excluded from its jurisdiction under Part II.

In any event, Petitioner's argument is meritless. The FPA and the Natural Gas Act ("NGA") are construed *in pari materia*. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). It has long been settled that the limited powers accorded FERC under § 16 of the Natural Gas Act (the companion provision to § 309 of the FPA) do not enable the Commission to "set at naught an explicit provision of the Act." *FPC v. Texaco, Inc.*, 417 U. S. 380, 394 (1974).

III. Congress's Reconsideration of the Scope of the Exclusion of Governmental Utilities From FERC Regulation in EPAct Confirms That There Are No Ongoing Issues of National Importance Warranting Review.

A. There is No Regulatory Void Because The Bonneville Decision Reflects The Carefully Considered Scheme of Regulation Congress Chose in 1935 and Continued in 2005.

Petitioner claims that, "by barring FERC from enforcing its refund orders against all sellers in those markets, including municipalities, the Court of Appeals has created a regulatory void where FERC has found rates to be unjust and unreasonable, but cannot require a remedy." Pet. 15. There is no regulatory void. The history of FPA § 201(f) shows that Congress expected governmental utilities to be self regulating,[21] while "public utilities" were to be subject to the Commission's jurisdiction. Congress reconfirmed that approach in 2005 except to the limited extent that it specifically provided for FERC regulation of the rates of certain larger government utilities under specified circumstances.

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[21] *See* Pet. App. 27a-28a; Pet. App. 28a n.9 (discussing legislative history).

The "regulatory void" that petitioner accuses the lower court of creating is not a void at all, but a deliberate Congressional choice as to the appropriate scope of the Commission's regulatory authority. Congress's decision to limit the scope of regulations must be respected as much as its decision to expand it. *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (state could not reregulate natural gas prices Congress had deregulated). Even in the orders reversed by the Ninth Circuit below, FERC disclaimed any authority to regulate bilateral sales by municipal utilities, a substantial portion in itself of the wholesale market. Directly at odds with its regulatory gap argument, Petitioner concedes and accepts that the § 201(f) exemption "obviously means that when a municipality makes a bilateral sale of electrical power to a buyer, FERC does not regulate the price." Pet. 6.

FERC remains fully empowered to ensure that the rates Congress empowered it to regulate – the rates of public utilities – are just and reasonable. Except for the specific provisions added to Part II by EPAct, FERC does not have the authority to regulate the sales at wholesale of governmental utilities.

B. Petitioner's argument that FERC regulation of public utilities may have a permissible "incidental" effect on municipal utilities also rests on a grossly distorted view of this Court's precedents.

Petitioner maintains that the Ninth Circuit's opinion conflicts with this Court's precedents approving agency actions that may incidentally affect matters outside their jurisdiction "to ensure that rates within [FERC's] jurisdiction are just and reasonable." Pet. 15. But this case does not involve incidental effects on nonjurisdictional entities.

"FERC *specifically ordered governmental entities/non-public utilities to pay refunds*, an action that lies outside Congress's clearly expressed intent that FERC's § 206 refund authority should apply only to public utilities." Pet. App. 26a (emphasis added).

Petitioner misreads this Court's decision in *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914) for the proposition that an agency charged with prohibiting discriminatory rates in interstate commerce could regulate intrastate rates – otherwise outside its jurisdiction – to remedy the discrimination. Pet. 17. Erroneously labeling the exemption of intrastate rates from the jurisdiction of the Interstate Commerce Commission as a "precursor" to § 201(f), Petitioner argues that "the proviso limited the agency's authority to fix intrastate rates in isolation, but this proviso had to yield where necessary to fulfill the agency's mission to ensure the lawfulness of rates within its jurisdiction." Pet. 18. That is a mischaracterization of the case. In *Houston East & West*, the Court makes clear that the ICC order in question had not altered in any way the rate set for intrastate traffic, but had directed instead that the interstate rate be set at the same level as the intrastate rate. 243 U.S. at 347.

Houston East & West was a precursor to the decision in another case cited by Petitioner, *FPC v. Conway Corp.*, 426 U.S. 271, 276-82 (1976). Pet. 20. *Conway* makes clear that the Commission cannot exceed the regulatory limits of the FPA by regulating exempt intrastate sales even where that would be helpful in eliminating discrimination with respect to FPA jurisdictional rates. While the Commission had a duty to consider the relationship between retail and wholesale rates in determining whether the wholesale rates were discriminatory, the Commission's power was limited to adjusting the wholesale rates of jurisdictional utilities

because it lacked any authority to regulate intrastate retail electricity charges:

> The prohibition against discriminatory or preferential rates or services imposed by § 205(b) and the Commission's power to set just and reasonable rates under § 206(a) are accordingly limited to sales "subject to the jurisdiction of the Commission," that is, to sales of electric energy at wholesale. The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates.

426 U.S. at 276-77.

Here, what the Ninth Circuit found unlawful was not the incidental effect of the agency's decision regulating the rates of public utilities, but its express directive that exempt utilities be subject to refund liability. Pet. App. 26a. There is nothing remotely incidental about the impact of the FERC's orders on exempt entities. The District of Columbia Circuit has recently reached an identical conclusion. *TANC*, 495 F.3d at 674-76.

C. Petitioner's Claimed Policy Concerns, Even Assuming Their Validity, Were Mooted by Passage of the Energy Policy Act of 2005.

Petitioner states that the decision below is *not* about FERC jurisdiction over bilateral sales by governmental utilities, and it concedes that FERC cannot regulate such sales. Pet. 6. Rather, it says, the import of this case is the

"Court of Appeals's failure to credit FERC's explanation of how refund orders work in these new-fangled centralized markets." Pet. 25.

Petitioner acknowledges, however, that EPAct specifically addressed the issue of governmental sales into centralized markets, and "amended FPA Section 206 to ... allow[] FERC to order refunds from certain very large municipalities [concerning]: short-term sales through centralized markets." Pet. 29. Straining to find some remaining life for its centralized market argument post-EPAct, Petitioner argues that the EPAct amendment "says nothing at all about how to treat the sales" by smaller municipal utilities. *Id.* at 30.

In other words, Petitioner's position is that pre-EPAct the FPA: i) barred FERC from ordering refunds with respect to all wholesale municipal sales made bilaterally; but ii) authorized FERC to order refunds with respect to all wholesale municipal sales made into centralized markets. Thus, in Alice in Wonderland fashion, Petitioner does not read EPAct § 1286 as a new source of FERC refund authority, but instead as creating an exception that cuts back on and limits the scope of FERC's prior refund authority against all governmental utility sales into centralized markets.

This argument is "as silly as it sounds." *Pub. Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984). EPAct ratifies the historic exemption of municipal utilities from rate regulation and carves out only a limited exception to the refund exemption. Indeed, EPAct amends § 201(f), not to limit the types of entities entitled to the exemption, but to bring rural electric cooperatives (who had been exempted as a result of administrative action by the agency) expressly *within* the statutory exemption. The import of EPAct is plain. Had

Congress intended to give FERC refund authority over all governmental utility sales into centralized markets it would have done so. Instead, it created a new and limited exception to the recognized exemption with respect to certain large municipal sales. Congress otherwise affirmatively chose to retain the broad and general refund exemption grounded in FPA §§ 201(f) and 206. Thus, now as before, the FPA provides FERC no general refund authority with respect to sales by governmental utilities of electricity at wholesale. Congress's 2005 amendment of § 206, giving FERC limited prospective refund authority with respect to a narrow category of governmental sales, only serves to confirm the Ninth Circuit's holding that prior to EPAct, FERC had no authority whatsoever to order refunds against governmental utilities. Pet. App. at 28a-29a n.10 ("the adoption of [EPAct § 1286] comports with our interpretation of the FPA.").

CONCLUSION

For all of the foregoing reasons the petition should be denied.

Respectfully submitted,

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November 8, 2007

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FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-155

IN THE
Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iv* of the Petition, and there are no amendments to that statement.

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INTRODUCTION[1]

The dollar amounts at stake in this case are immense; municipalities overcharged the California power markets in 2000-2001 by a half billion dollars or more, based on the FERC refund calculation methodology. The Court of Appeals's ruling jeopardizes that relief. Even more important than the money that would flow back to California consumers are the principles at stake and their impact on FERC's power to ensure just and reasonable rates in the newly created electricity markets now prevalent across the nation. Regional electric markets operated by public utilities transmit the vast majority of the electric power consumed in the United States today. Municipal power sellers play a significant role in each of those markets.

The Ninth Circuit's conclusion that FERC cannot enforce its orders uniformly within those markets will create lasting inequities and inefficiencies that will extend far beyond just this case. Contrary to Respondents' arguments, the Federal Power Act (FPA) does not permit, much less require, such non-uniform—indeed, discriminatory—treatment.

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[1] The abbreviations and terminology used in the Petition will be used in this brief. The Petition will be cited as "Pet." The brief filed by various municipalities, "Brief of the Governmental Respondents in Opposition," will be cited as "Muni." and the Federal Government's brief, "Brief of the Federal Respondents in Opposition," will be cited as "Fed."

ARGUMENT

I. THIS CASE PRESENTS ISSUES OF CONTINUING NATIONAL SIGNIFICANCE.

Respondents do not dispute any of the following points. First, the past decade has seen the rise of a "brave new regulatory world," in which centralized energy markets dominate the scene. *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1301 (D.C. Cir. 2007). Fully two-thirds of the electric power consumed in the United States flows through such centralized markets. Pet. 28. Second, some 3,000 municipalities play a major role in these centralized markets. Pet. 29. Municipalities generate about a fifth of the energy consumed in the United States. Pet. 28. Third, the markets cannot operate efficiently or fairly if FERC cannot exercise jurisdiction over *all* the sales and order all participants in the markets to abide by the same rules. Pet. 29. Fourth, Congress never conceived of this brave new world when it crafted the FPA 80 years ago. Pet. 23-25.

Despite all these tacit concessions, Respondents insist the legal issue presented here is "of minimal ongoing importance." Fed. 9. Their main basis for minimizing the importance of this gaping regulatory hole is the Energy Policy Act of 2005 (EPAct). Respondents assert that Congress has resolved the question, for better or worse.

Respondents are mistaken. EPAct does not resolve the statutory question presented here. It addresses a completely different type of refund obligation that is imposed in entirely different circumstances. One applies to situations where FERC *changes* a tariff; the other applies to the very

different situation where FERC *enforces* an existing tariff against entities that *violated* it.

The question presented here is the scope of the Commission's authority to order refunds of the first type, which is governed by Section 206(b) of the FPA, 16 U.S.C. § 824(e)(b). The starting point for such a refund is Section 206(a), which authorizes market participants to file a complaint at FERC if they believe a filed rate is not just and reasonable. If FERC agrees, it has the power to set a new rate—but only prospectively. FPA § 206(a), 16 U.S.C. § 824e(a). Since, however, FERC cannot investigate and fix a new rate instantaneously, Congress created a stopgap to protect consumers from the effects of administrative delay. The stopgap is codified in Section 206(b), which authorizes FERC to order refunds for the period while FERC's regulatory proceeding is under way. FPA § 206(b), 16 U.S.C. § 824e(b).

FERC implements this sort of refund by establishing a "refund effective date" shortly after the filing of the complaint—thereby providing notice that amounts collected thereafter are subject to refund. Once FERC fixes a new tariffed rate, it orders that the rate will be effective all the way back to that refund effective date. *Id.* The refunds currently at issue in this case were all ordered under Section 206(b), arising from transactions that were made after the complaint was filed in the underlying FERC case, but before FERC issued its orders correcting the markets.

EPAct did not modify Section 206(b) in any relevant way when it added a new provision—Section 206(e), 16 U.S.C. § 824e(e) (Supp. V 2005). That provision has nothing at all to do with

circumstances where FERC *amends* a filed tariff and seeks refunds based on the changed rate. Section 206(e) focuses only on the second sort of refund—where FERC finds a *violation* of a tariff. The distinction is plain on the face of Section 206(e)(2), which reads in pertinent part:

> If an entity described in section 201(f) of this title [a municipality] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) *and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale*, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

16 U.S.C. § 824e(e)(2) (emphasis added).

The distinctions are profound. Whereas Sections 206(a) and (b) address forward-looking changes in rates after a complaint is filed, Section 206(e) is concerned with violations of FERC tariffs or rules that occurred *before* the filing of a complaint. Moreover, relief under Section 206(e) is not limited by the refund effective date (as is relief under Sections 206(a) and (b)), but rather is available for the period that the existing tariff rate was not followed. Finally, Section 206(e) refunds address the impact of violations where the rate charged differed from the rate on file at the time of the sale; in contrast, Section 206(b) addresses the impact of rates that have been changed by the Commission pursuant to Section 206(a) *after* the time of the sale.

In short, Section 206(e) provides no answer to the central question in this case: whether FERC has authority to direct refunds against municipalities pursuant to Section 206(a) and (b). Section 206(e) does not say whether refunds are available against municipalities that participate in centralized clearing house markets whose rates are found to have been unjust. Section 206(e) does not address the extent of refund liability under the procedural and temporal constraints of Section 206(b). Section 206(e), therefore, neither addresses nor fills the regulatory void that the Court of Appeals has created.[2]

Respondents also assert that this case is unimportant—because the "perfect storm" of circumstances that gave rise to the California market disturbance of 2000-2001 [is] not likely to be repeated." Muni. 2-3. There is no way to predict whether a catastrophe will ever arise again; no one expects crises. More to the point, however, the importance of this issue does not depend upon whether unjust rates will ever again reach crisis proportions. This issue is important because

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[2] EPAct did amend Section 206(b), but in a manner that bears no relation to the issue of municipal liability. Before EPAct, Section 206(b) provided that the earliest possible refund effective date would be 60 days after filing of a complaint under Section 206(a). The amendment provides that FERC can set a refund effective date as early as the very day of filing of the complaint. The amendment was designed to expand refunds by erasing the 60-day lag in the old provision. *See Comprehensive National Energy Policy: Hearing on H.R. 6 Before the Subcomm. on Energy and Air Quality*, 108th Cong. 51 (2003) (statement of Comm'r Massey, FERC).

sometimes tariffs yield unjust and unreasonable prices, and when they do, Congress has directed FERC to step in and reset the price. FPA § 206(a), 16 U.S.C. § 824e(a). If the Court of Appeals opinion stands, FERC will have refund authority over only a portion of the market—letting municipalities cheat the system by collecting refunds on purchases while denying refunds on their contemporaneous sales. The issue is important because it impacts markets that now govern two-thirds of the country's wholesale electric power—covering 30 states across this country. Pet. 28. With or without a looming crisis, the issue remains important because the holding undermines the effectiveness of the Section 206(b) refund remedy, a remedy that FERC routinely invokes and that is a central feature of FERC's consumer protection mission.

II. THE COURT OF APPEALS OPINION CONFLICTS IRRECONCILABLY WITH THIS COURT'S PRECEDENTS.

A. FERC'S Interpretation of the Scope of its Refund Authority was Consistent with an Unbroken Line of Precedents on the Authority of Agencies to Regulate the Transactions of Entities that Are Ordinarily Outside their Jurisdiction.

FERC did not hold, and PG&E is not arguing, that municipalities fall within FERC's jurisdiction or "that the jurisdictional limitations . . . may be disregarded." Fed. 11. Nor did FERC, or PG&E, make the absurd argument "that a regulatory agency may disregard a jurisdictional restriction in order to regulate directly a matter over which

Congress has expressly denied the agency regulatory power." Fed. 12.

Rather, the argument is that when a municipality opts to sell its power through a centralized market subject to FERC's jurisdiction, and FERC concludes that the prices paid throughout that centralized market were unjust and unreasonable, FERC can order all the participants in the market to pay refunds. FERC has that power not because it has jurisdiction over the municipalities *per se*, but because it has jurisdiction over all sales within the centralized market operated by a public utility. Exercising that jurisdiction is the only way to ensure that FERC can effectively regulate these markets.

As the Petition details, FERC's holding was consistent with a long line of Supreme Court authority finding jurisdiction in similar circumstances. Pet. 16-22. The litany begins with *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914). Respondents acknowledge that "this Court upheld the regulatory jurisdiction of the Interstate Commerce Commission . . . over allegedly discriminatory interstate transportation rates, even though the remedy ultimately adopted affected intrastate rates that were beyond the ICC's jurisdiction." Fed. 11. But they insist the case is inapposite because "[t]he ICC did not purport to regulate any *intrastate* rates directly." *Id.*; *see* Muni. 15.

The fact that the ICC did not regulate intrastate rates "directly" is the point of the case. The ICC ordered the railway to equalize interstate and intrastate rates, and that order "relieved [the railway] from further obligation to observe the

intrastate rates." 234 U.S. at 350. Thus, the ICC order had a very real impact on intrastate rates despite the express prohibition on ICC regulation of such rates. This Court upheld the ICC determination, concluding that it would create an unacceptable regulatory void if the agency could not so act. The Court explained, "in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation." *Id.* at 358-59. The same principle applies with full force here. Stripping FERC of the authority to compel compliance by municipalities that sell into centralized markets subject to FERC's jurisdiction gives rise to exactly the regulatory void the Court rejected in *Houston*.

Respondents' efforts to distinguish the other cases discussed in the Petition are equally unavailing. Each of those cases supports FERC's authority to consider and impact non-jurisdictional rates or activities. While none of the cases directly address the activity at issue in this case—*the sales by governmental entities into centralized markets operated by public utilities*—they broadly support the proposition that FERC must have the authority to regulate and require refunds for such sales as part of its statutory duties under the FPA.

Particularly conspicuous is the absence of any reference, in either opposition brief, to *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which the Petition discussed at length. Pet. 18-20. The case deals with curtailment—that is, limiting volumes to be delivered. As the Petition explains,

in *Louisiana Power,* the Court upheld the Commission's approval of orders that would curtail "direct sales" customers otherwise exempt from NGA jurisdiction. Again, the agency did not set about to curtail or regulate in any way direct sales, but it found that it could not effectively exercise its responsibility with respect to wholesales sales without curtailing direct sales as well.

Respondents have no explanation for why it is appropriate to ignore this Court's admonition in *Louisiana Power* that "Congress 'meant to create a comprehensive and effective regulatory scheme,' of dual state and federal authority," and that Congress intended that there "would be no 'gaps' for private interests to subvert the public welfare." 406 U.S. at 631. Though the Court was speaking of natural gas regulation, the conclusion is just as applicable to electric regulation. Unless the Court grants certiorari in this case, there will be a regulatory gap that Congress did not intend.

Respondents also improperly and incorrectly attack the argument that the jurisdictional provision must be read together with the Commission's authority under Section 309 of the FPA, which authorizes FERC to take any actions "as it may find necessary or appropriate to carry out" its regulatory mission. FPA § 309, 16 U.S.C. § 825h. As an initial matter, the municipalities are incorrect when they assert that this is a "basis the agency did not assert." Muni. 12. FERC did identify and rely on Section 309 in the orders under review. *See, e.g., San Diego Gas & Elec. Co.,* 97 FERC ¶ 61,275 at p. 62,185, n.65 (2001) (explaining FERC's authority to order refunds, with citation to Section 309, in response to arguments

raised by municipalities); *id.* at p. 62,202, n.170 (explaining that Section 309 "gives the Commission the necessary flexibility to take unusual remedial action in appropriate circumstances").

Respondents are also incorrect that the invocation of Section 309 is impermissible under *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). Muni. 13; Fed. 12 n.6. There, the Court was concerned with the FPC's effort to effectively deregulate small producers. The Court observed that Section 16 of the Natural Gas Act, a section analogous to Section 309, did not "vest authority in the Commission *to set unjust and unreasonable rates.*" 417 U.S. at 394 (emphasis added). Thus, *Texaco* stands for the proposition that FERC did not have authority to override its key statutory charge that rates must be just and reasonable—the situation is the exact opposite of the situation here, where FERC's action was taken to effectuate its statutory charge to ensure just and reasonable rates.

Far more pertinent in the circumstances of this case is *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), which addressed the same NGA provision. There, in response to the Commission's exercise of this "necessary and proper" power, the Court held that "the Commission's broad responsibilities . . . demand a generous construction of its statutory authority." *Id.* at 776.

B. FERC's Interpretation Was Entitled to *Chevron* Deference.

Respondents incorrectly assert that FERC is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), because the statute at issue is unambiguous. Fed. 13-15; Muni. 10-12. Respondents do not suggest for a moment that Congress actually contemplated the possibility that municipalities would participate in centralized markets under FERC's jurisdiction, when it passed the FPA back in 1935. *See* Pet. 23-30. To the contrary, FERC's brief before the Court of Appeals emphasized the 1935 legislative history in which witnesses explained to Congress that municipalities in 1935 simply did not sell power in wholesale markets—a quaint world that is far different from today. Brief of Respondent FERC on Jurisdictional Cases at 21-25, Bonneville Power Administration v. FERC, No. 02-70262, *et al.* (9th Cir. Jan. 31, 2005). Indeed, the D.C. Circuit highlighted the ambiguities presented by modern power markets in *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000). *See* Pet. 23-24.[3]

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[3] The municipalities incorrectly fault PG&E for making this argument "incredibly, without even citing *Chevron*." Muni. 10. When an argument is about "Supreme Court Precedent Requiring Deference to a Regulatory Agency," Pet. 23, this Court hardly needs a primer on *Chevron*. Moreover, PG&E did invoke *Chevron* in a block quotation to *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (1994), and set up the controlling principles while discussing *APX*. Pet. 23-24. The centerpiece of that discussion was *Chevron*.

Nor do Respondents explain how the answer to the question here—whether FERC has refund jurisdiction over all sales in a centralized market operated by a public utility—could possibly be unambiguous in light of conflicting Congressional directives applicable to this case: On the one hand to ensure that all rates charged under tariffs of public utilities are just and reasonable; on the other hand to exclude municipalities from FERC's jurisdiction. *See* Pet. 6-7. The plain language of the FPA simply does not answer the question with clarity.

Because the statute is ambiguous, FERC's interpretation must be upheld so long as it is a reasonable construction of the statute. *See Chevron*, 467 U.S. at 843. It most certainly is: FERC's interpretation accorded with the fundamental purpose of the act—the protection of consumers—by ensuring that consumers receive refunds for amounts they were overcharged by *all* the participants in those FERC-regulated markets. Furthermore, FERC's analysis was faithful to both the FPA's overarching directive, to ensure that rates are just and reasonable, and to this Court's precedents interpreting the same language in the FPA and similar statutes.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 19, 2007